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NEW YORK, SEPTEMBER 28th, 1898.

Testimony taken on behalf of the Complainants and of the Cross Complainants under the 67th Rule in Equity upon the issues joined upon the pleadings herein.

NOTICE FOR TAKING TESTIMONY.

IN THE CIRCUIT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

EMMA S. FAYERWEATHER and others,
against
THOMAS G. RITCH and others.

—

JOHN B. REYNOLDS as Executor,
against
THOMAS G. RITCH and others.

Equity No. 6675

GENTLEMEN:

TAKE NOTICE, that pursuant to the 67th rule in equity the complainants in the original bill and the complainant in the cross bill herein, will proceed to take tes-

timony under the issues joined between them and the several defendants, before John A. Shields, Esq., an examiner of this court, in his office in the U. S. Court House in the Borough of Manhattan, City of New York, on the 2nd day of January, 1901, at two p. m., and from day to day until concluded, and that you are notified to be present if you shall see fit.

Dated December 29, 1900.

ROGER M. SHERMAN,
Solicitor for Complainants in original bill.

3

WILLIAM BLAIKIE,
Solicitor for Complainant in cross bill.

4

PROOFS OF SERVICE AND ADMISSIONS.

As appears by the original proof of service on the file in the clerk's office of this court service of a copy of the above notice was admitted Dec. 31st, 1900.

By Lockwood & Hill, attorneys for defendant, Trinity College.

Alexander & Green, attorneys for defendant, Princeton College.

Root, Howard, Winthrop & Stimson, attorneys for defendant, Hamilton College.

Wm. W. Hoppin, attorney for defendant, Brown University.

Redding, Kiddle & Greeley, attorneys for defendant, Northwestern University.

E. W. Paige, attorney for defendant, Union College.

J. McLean Nash, attorney for defendant, Columbia College.

Opydyke, Wilcox & Bristow, attorneys for University of City of New York.

Guggenheimer, Untermeyer & Marshall, attorneys for defendant, Mt. Sinai Hospital.

A copy was also served on DeForest Bros., attorneys for defendant, Presbyterian Hospital.

On Marshall, Moran, Williams & McVicker, attorneys for defendant, St. Luke's Hospital.

On James L. Bishop, attorney for defendant, Amherst College.

On Putney, Twombly & Putney, attorneys for defendants, Williams College and Union Theological Seminary.

On Parsons, Shepard & Ogden, attorneys for defendants, Bulkley, Vaughan and Cooper Union.

On S. S. Terry, attorney for defendant, University of Rochester.

On Russell & Holmes, attorneys for defendant, Dart-
7 mouth College.

By depositing a copy thereof in their respective office letter boxes on Dec. 31st, 1900, the offices being closed at the time.

On Scott & Upson, attorneys for defendant, Adelbert College.

On Swayne & Swayne, attorneys for defendant, Lafayette College.

On Butler, Notman, Joline & Mynderse, attorneys for defendant, Bowdoin College.
8

On Ritch, Woodford, Bovee & Wallace, attorneys for defendants, Ritch, Cornell University and Marietta College.

By delivering a copy of said notice to the persons in charge of their respective offices and leaving it with them Dec. 31st, 1900.

On G. G. & F. Reynolds, attorneys for defendant, Wesleyan University, and

On Haley Fiske, attorney for defendant, Yale College, by duly mailing a copy to each at their respective office addresses.

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

FAYERWEATHER

vs.

9 RITCH.

REYNOLDS

vs.

RITCH.

Before John A. Shields, Esq. Examiner.

Deposition of witnesses taken pursuant to notice under the 67th Rule in Equity on behalf of the complainants in the original bill and the complainant in the cross bill.

10

NEW YORK, January 2nd, 1901.

APPEARANCES :

Roger M. Sherman, Esq., and William Blaikie, Esq., Solicitors for complainants.

John E. Parsons, Esq.,
Solicitor for Messrs. Bulkley & Vaughan, executors.

C. N. Bovee, Jr.,
Solicitor for Thomas G. Ritch, executor, and for Marietta, Cornell, Wesleyan and Yale Colleges.

James L. Bishop, Esq.
Solicitor for Amherst College.

William B. Putney, Esq.,
Solicitor for Williams College.

Messrs. Putney & Bishop,
Solicitors for Union Theological Seminary.

Messrs. Russell & Holmes,
Solicitors for Dartmouth College.

Messrs. Nash & Jones,
Solicitors for Columbia College.

11 Messrs. Root, Howard, Winthrop & Stimson,
Solicitors for the Trustees of Hamilton College.

Messrs. Butler, Notman, Joline & Mynderse,
Solicitors for Bowdoin College.

Messrs. Scott & Upson,
Solicitors for Adelbert College.

Francis J. McLoughlin, Esq., of counsel.

Franklin B. Myrick, called as a witness, being duly sworn, testified as follows:

Direct examination by Mr. Sherman:

12 Mr. Bishop: I object on behalf of my clients to the taking of any testimony at this time on the ground that a stipulation has been filed in the case of Fayerweather against Ritch and others on the 5th day of October, 1900, by which it is agreed between the parties that the record taken under the plea of the trustees of Hamilton College shall be deemed the record under the plea filed by Amherst and Williams Colleges and the Union Theological Seminary. I object to the taking of any testimony under the cross bill filed by John B. Reynolds upon the ground that the said cross bill has been dismissed by reason of the failure of the plaintiffs to file a replication thereto under the rule of the Court.

Mr. Sherman: In whose behalf do you take that latter objection?

Mr. Bishop: On behalf of the Union Theological Seminary.

Mr. Sherman: Any more?

Mr. Bishop: That is all for the present, Mr. Sherman.

Mr. Stimson: I want to note this objection as to Hamilton College, that in the case of Fayerweather against Ritch we object to the taking of any testimony on the ground that the proofs have been entirely closed in
13 the case and a final decree has been rendered.

Mr. Sherman: Now I will ask Mr. Myrick some questions.

1 Q. What is your occupation?

A. Clerk for the executors of the estate of Daniel B. Fayerweather.

2 Q. What are your functions in that capacity?

A. I attend to all the office work and all the outside work regarding their properties.

3 Q. Are the papers of the estate in your more immediate custody?

A. Some of them; yes, sir.

4 Q. Are the vouchers in your custody?

A. What vouchers?

14 5 Q. Any vouchers.

A. Some of them are.

6 Q. What are?

A. The checks returned from the various banks excepting those drawn on the New York Life Insurance and Trust Company, which are held by that company.

7 Q. Are the vouchers for payments made in 1891 and 1892 to Lucy Fayerweather or upon her order in your custody?

A. Some of the checks are.

8 Q. And is that true of vouchers other than checks?

A. Well, the vouchers are filed with the accounting of March 1st, 1892.

9 Q. In the Surrogate's office?

A. In the Surrogate's office.

10 Q. Did there come into your possession at any time a writing purporting to have been signed by Mr. Fayerweather on the 15th of November, 1890, addressed to you and to Mr. Vaughan authorizing you to pay a sum of money to Mrs. Lucy J. Beardsley?

A. No, sir; it never was in my possession and I have no remembrance of ever having seen the letter. There is every probability that I did, but at this moment I 15 cannot remember that I ever saw it.

11 Q. Do you remember the amount of money or securities which that paper purported to authorize you to hand over to Mrs. Beardsley?

A. Only from hearing it in court or reading it in the evidence. My remembrance is that it was $100,000.

12 Q. And did you ever hand over to her $100,000, in pursuance of that direction?

A. I did not; I had no authority to do so.

13 Q. Then that letter was not honored by yourself and Mr. Vaughan?

A. Not by me.

14 Q. Was it to your knowledge by Mr. Vaughan?

A. It was by the executors.

16 15 Q. It was by the executors?

A. That is, under the deed of gift.

16 Q. That was subsequently to the 24th of February, 1891?

A. It was subsequently to the 24th of February, 1891.

17 Q. That is the date of the deed of gift, is it not?

A. Oh, yes, subsequent to it.

18 Q. And of course after Mr. Fayerweather's death?

A. Yes, sir.

19 Q. Then no transfer of money or securities or property ever occurred under that authority in Mr. Fayerweather's life time?

A. Not in his life time; no, sir.

Q. As you understand it, did that letter refer to any particular securities or property ?

A. No, sir.

Q. Or was it a direction against his general assets ?

A. As I remember, it was a statement of that amount.

Q. There was no direction, so far as you understand, to apply any specific property or securities to that purpose ?

A. No, sir.

Q. And there was no specific property in your possession or in that of Mr. Vaughan's at the time of Mr. Fayerweather's death corresponding to the directions in that letter ?

A. Not other than that included in his estate.

Q. In his general assets ?

A. No, sir.

Q. There was no setting apart of any such fund in his life time ?

A. No, sir.

Q. Where was that letter when you last saw it ?

A. I do not know that I ever saw it but I think that I must have seen it; of course, some time has elapsed since it was written; it is all guess work, and I cannot remember of ever having seen the letter.

Q. You are unable to give us any idea or clue as to its present whereabouts ?

A. No, sir.

Q. It is not in the Surrogate's office, is it ?

A. There is no reason for it to be in there. I should say not.

Q. Did Mr. Vaughan and you ever have any discussion as to whether you should comply with it, or in what manner you should comply with it ?

A. Not a word as far as I was concerned.

Q. Never discussed it together ?

A. Never discussed it at all.

31 Q. Mr. Vaughan never mentioned that writing to you or you to him ?

A. I have said that the probabilities are that I must have seen the letter, but I have not the slightest remembrance that I ever did.

32 Q. And you have not the slightest remembrance of your mentioning that letter to Mr. Vaughan or of his mentioning it to you, is that what you say ?

A. Yes, sir.

19 33 Q. Were you present at the time of the trial of the so-called Five Colleges Action before Judge Truax ?

A. Yes, sir.

34 Q. Were you in Court during the trial, the greater portion of the time ?

A. Yes, sir.

35 Q. Were you in Court when that writing was offered in evidence ?

A. That I cannot say; it seems to me that the only time that I came across that was in the Surrogates—it seems to me it was in the Surrogate's trial, the trial before the Surrogate; I cannot locate the exact time that I saw it.

20 36 Q. How does your memory serve you as to its connection with the Surrogate's trial ?

A. My remembrance of it is that it was brought out in the testimony that was given by Mr. Vaughan as to what he was doing the morning of the day Mr. Fayerweather died, and it was specified that he had written a letter, and I think that letter came out and was in evidence, substantially.

37 Q. That he had written a letter and that Mr. Fayerweather had signed it ?

A. Yes, sir.

38. Q. Addressed to you and him ?

A. Yes, sir.

39 Q. And did he produce it ?

A. There in court ?

40 Q. Yes.

A. Well, it is merely guess work; it may have been in before Truax, and it might have been before the Surrogate. I cannot recollect where it was.

41 Q. Your memory does not serve you at all as to when and where you first saw it or last saw it, if you ever did see it.

A. No, sir.

21 42 Q. And it is not now in your possession ?

A. No, sir, it is not.

43 Q. And it is not now among the papers of the estate of Daniel B. Fayerweather in your custody ?

A. It is not.

44 Q. Has it been the practice of the executors to leave to you the custody and control of the various writings relating to the business of the executors ?

A. Not all of them.

45 Q. The principal bulk of them ?

A. Well, if you were to describe writings more particularly I might answer more definitely.

46 Q. You cannot answer the question without a more specific question ?

22 A. No, sir; there was a great many letters.

47 Q. Do you maintaln an office in the Potter Building ?

A. Yes, sir.

48 Q. On the door of which are the words Fayerweather Estate ?

A. Yes, sir.

49 Q. And the rent of which is paid by the executors ?

A. Yes, sir.

50 Q. And which is appropriated to your use as the clerk of the executors and to their use as executors ?

A. Yes, sir.

51 Q. And is it there principally that the documents relating to their business are kept ?

A. Yes, sir.

52 Q. Do you also keep a safe deposit vault ?

A. Yes, sir.

53 Q. Where ?

A. In the Nassau.

54 Q. Who has access to that ?

A. Mr. Vaughan, Mr. Bulkley and Mr. Ritch.

55 Q. And yourself ?

23 A. No, sir.

56 Q. Have you never gone there to get papers out in the absence of either of them ?

A. No, sir; nobody can get a paper out unless Mr. Bulkley is present.

57 Q. Only when Mr. Bulkley is present ?

A. Yes, sir, when Mr. Bulkley is present; he has the pass key.

58 Q. And there is no other pass key ?

A. No, sir; not other than that held by the bank. Mr. Vaughan and Mr. Ritch could not go there together and take anything out.

59 Q. Are you aware whether that letter is in that vault ?

24 A. I am very certain that it is not.

60 Q. You are acquainted with all the contents of that vault, are you ?

A. Well, very nearly, yes, sir.

61 Q. Very nearly ?

A. Yes, sir.

62 Q. Where does your knowledge of the contents leave off and your ignorance of the contents begin ? Is there any way of formulating that ?

A. It is my remembrance of what I saw there last Thursday or Friday.

63 Q. Did you look thoroughly through the vault Thursday or Friday ?

A. I did.

64 Q. And did you see everything there was in there at that time ?

A. I saw every package; I did not examine every item in every package, but I would hazard enough to say that it was not there.

65 Q. That is all you would say ?

A. That is all I can say.

66 Q. You cannot give us any specific description of the contents of that vault more than to say that the pa-

25 per is not there; is that right ?

A. No, sir; I can tell you a great many things about it.

67 Q. Well, go on; what is there there ?

A. Well, there is the letters testamentary, the certificate of jointure of H. B. Vaughan with Mr. Bulkley and Mr. Ritch.

68 Q. A what, a jointure ?

A. Yes; they were made executors afterwards.

69 Q. What do you mean by the certificate of jointure ?

A. The certificate that was issued by the Surrogate's Court.

70 Q. You mean the letters testamentary issued under the codicils ?

A. I mean the certificate of letters testamentary hav-

26 ing been issued.

71 Q. Under the codicils ?

A. Yes, sir.

72 Q. First the letters testamentary were issued to Messrs. Bulkley and Ritch under the will ?

A. Yes, sir, under the will.

73 Q. And after the contest there was another document ?

A. Sometime in March, yes, sir.

74 Q. Issued to them all three, to all three of them ?

A. No.

75 Q. Or was it simply to add him to the other certificate ?

A. Mr. Vaughan was joined with them, the other certificate having been issued to the other two only.

76 Q. What else ?

A. The agreements of the twenty colleges and the five hospitals, the agreements of the thirty-two donees, a receipt by Latman, Meyer & Goldstein, or Goldsmith, for certain papers that were used at the time of the examination of the title of 43rd and 44th Street, two letters of Martin W. Cook, sundry old papers that referred to the 44th Street property.

27 77 Q. What do you mean by old papers referring to the 44th Street property ?

A. Well, deeds and transfers made by a man named Laylor and somebody or another, I forget, before it came into the hands of Samuels from J. B. Hyde & Company. Then there were certain papers referring——

78 Q. Before you take up that let me interpose a question so as not to go back afterwards. Are you speaking now of papers relating to title to land between 43rd and 44th Streets on First Avenue in the City of New York ?

A. Yes, sir.

79 Q. Land which is now supposed to be owned by the United Dressed Beef Company ?

A. Yes, sir.

28 80 Q. And these papers are papers relating to the title before Mr. Fayerweather took it ?

A. Yes, and I think some of them are before Samuels had it; there were three or four sub-divisions of it; I think there were four or five parts of the property.

81 Q. Now, Mr. Fayerweather took the title to that property, did he, from J. B. Hyde & Company ?

A. No, sir.

82 Q. From whom did he take it ?

A. He took the title from Edward R. Ladew and J. H. Ladew.

83 Q. When ?

A. He took it in—I think as of December 1st, 1889.

84 Q. Did you attend to that yourself as in his employ?

A. Not particularly; I was there a number of times, but the man principally in charge was William Ladew.

85 Q. Well, after Mr. Fayerweather took the title did you collect the rents for that property?

A. I receive the rents, yes, sir.

86 Q. And did you keep a book of accounts in relation to those collections?

A. Yes, sir.

87 Q. And is that now in your custody?

29 A. It is.

88 Q. What do you call it?

A. Well, I should say cash book.

89 Q. Well, I suppose there are a good many cash books. Is this any particular cash book?

A. Well, you might say Mr. Fayerweather's cash book and I would know what you meant by it.

90 Q. And how long after his death did you continue to collect the rents there?

A. Well, that was stopped at the time he died. William Ladew held the rents in abeyance until the executors were determined and then the money was turned in.

91 Q. You mean Mr. Ladew collected the rents?

A. Mr. William Ladew who was the man in charge at

30 the time.

92 Q. In charge of the firm, do you mean?

A. No, he was a clerk of Mr. Fayerweather's and acted at what we call the hide houses.

93 Q. What is that?

A. That is a subdivision of that property.

94 Q. He collected the rents?

A. Yes, sir, he collected the rents and turned them in to the office. After November 15th he held the rents in abeyance until after the executors were appointed and then the money was turned in.

95 Q. You took no receipt for the money so turned over, did you?

A. Any receipt?

96 Q. Yes, from the executors. Did Mr. Ladew take a receipt from the executors or did you take one?

A. I do not know.

97 Q. These accumulated rentals went to the executors?

A. Yes, sir, to the executors.

98 Q. You do not know whether they gave a receipt for them or not?

A. I do not, no, sir.

99 Q. Were you paid by Daniel B. Fayerweather in
31 his lifetime, within a month before his death, the sum of $25,000, for your personal use?

A. I decline to answer anything about Mr. Fayerweather's private acts.

100 Q. Why?

A. It has nothing to do with the will——

101 Q. Are you an attorney or counsellor at law?

A. No, sir.

102 Q. Are you a physician or surgeon?

A. I am not.

103 Q. Well, upon what ground do you decline to answer? Do you think you have some privilege?

A. I think I have that privilege.

104 Q. Do you mean to claim that you have a
32 legal privilege to decline to answer this question?

A. I do; I have had it sustained twice.

Mr. Sherman: You may have it sustained three times, but I doubt it. I move the examiner to certify the refusal of the witness to the Court for its action.

105 Q. Did Mr. Fayerweather pay you $25,000 within thirty days of his death and instruct you as to what you were to do in reference to his property and in reference to his family in return for that payment?

A. Mr. Fayerweather never gave me any directions with regard to any act of mine towards his family.

106 Q. What did Mr. Fayerweather say to you when he gave you the $25,000 before his death?

A. I decline to answer that question.

Mr. Sherman: I ask that the certificate also include this refusal. I think that is all, Mr. Myrick, until we see what the Court thinks of your objection. I want to state at four o'clock I shall endeavor to bring the Judge's attention to your refusal to answer. I suggest that you be represented if you want to stand by your objection.

I certify the above record.

Examiner.

33

34

TESTIMONY OF L. A. LONDON.

LEWIS A. LONDON, called as a witness on behalf of the complainants, being duly sworn, testified as follows:

Direct examination by Mr. Sherman:

1 Q. What is your occupation?
A. I am with the United States Dressed Beef Company.
35 2 Q. You are the company?
A. I am with the company.
3 Q. In what capacity?
A. I am the secretary.
4 Q. And how long have you been connected with the company in any capacity?
A. Ever since their organization.
5 Q. When was that?
A. I believe in 1891.
6 Q. What part of 1891; can't you give us the date?
A. Well, as near as I can recollect, in the spring of 1891.
7 Q. That company is a corporation organized under the laws of the State of New York, is it?
A. Yes, sir.
36 8 Q. What connection, if any, did it have with the New Jersey & New York Abbatoir Company?
A. No connection whatsoever.
9 Q. Was it the lessee of that company?
A. No, sir.
10 Q. Never held a lease from that company?
A. No, sir.
11 Q. Did you occupy the premises that you now occupy prior to the formation of this corporation?
A. Yes, sir.
12 Q. You moved in there when the corporation was formed?

A. Oh, no; the corporation was formed before this building was finished.

13 Q. Well, when was the building finished?

A. I believe in the spring of 1892.

14 Q. Well, of what corporation or person were you tenants before you purchased the land?

A. We were tenants of Schwarzchild & Sulzberger.

15 Q. You were sub-tenants, were you?

A. Yes, sir.

16 Q. And do you know of whom Schwarzchild & Sulzberger were tenants? Who was their landlord?

37 A. They had no landlord. I believe they leased the property that we was in.

17 Q. Then they must have had a landlord.

A. I believe it is the Butchers' Hide & Melting Association.

18 Q. Well, they did not own the land, did they, the Butchers' Hide & Melting Association?

A. They owned the property.

19 Q. Where you are now?

A. No, Sir.

20 Q. I am talking about the land where you are now.

A. I am talking about where we were prior to the time we went over there.

21 Q. I want to know who was your landlord of the land where you are now prior to your purchase of the

38 land where you are now.

A. Well, I had one building where Fayerweather & Ladew were the landlords; we each of us had separate buildings; my own building was owned by Fayerweather & Ladew.

22 Q. Well, the other; who was landlord of that?

A. I guess Fayerweather & Ladew were the landlords of the biggest part of it.

23 Q. You never paid rent to anyone else for the land?

A. No, sir.

24 Q. You do not know of rent being paid to anyone else as landlord?

A. I do not.

25 Q. Well, how long had you been on that land?

A. I was on that land since 1876.

26 Q. Various corporations?

A. No, under a landlord as a tenant.

27 Q. As a tenant, but you individually the tenant; or was it a corporation that was the tenant?

A. No, my brother and myself were the tenants.

28 Q. Until the corporation was formed?

39 A. Yes, sir.

29 Q. Your brother and you formed the United Dressed Beef Company, did you?

A. No, sir; we joined them.

30 Q. Well, the others who joined with you were not tenants of the land at all, were they?

A. Some were, and some were not.

31 Q. Well, who were?

A. The tenants of that land were Mr. Blumenthal, a party named Steifel, a party named Sollinger and myself; the rest were not.

32 Q. All of them conducting a butcher business there?

A. Yes, sir.

33 Q. And all, as you understand it, tenants of

40 Fayerweather & Ladew?

A. These four were.

34 Q. These last named four?

A. Yes, sir, these last four.

35 Q. Was it not part of the arrangement by which you were tenants there that you furnished hides to Fayerweather & Ladew?

A. My agreement was part of that.

36 Q. That is, your rent was payable partly in hides, was it?

A. No, we had to turn in the hides to the landlord;

that was the custom in the wholesale butcher business for years, and it is to-day.

37 Q. That was not specified as part of the rent?

A. No, sir.

38 Q. And that went on constantly, did it?

A. Yes, sir.

39 Q. For some years?

A. Yes, sir, for some years.

40 Q. Who personally attended to seeing that that branch of the business was properly conducted, your

41 self?

A. I do not understand that question.

41 Q. Who personally attended to seeing that that branch of the business was properly conducted, yourself?

A. What do you mean by that branch?

42 Q. Turning the hides to Fayerweather & Ladaw?

A. Well, we simply killed the cattle, slaughtered the cattle, and they came for the hides and took them out, they had a hide house at the foot of our street and they weighed them.

43 Q. And you saw that they were delivered on their application, did you?

A. Sometimes I did and sometimes I saw them weighed.

42 44 Q. Well, was there anyone else connected with your firm or your corporation who had more to do with that than you had?

A. No, sir.

45 Q. Do you remember when Mr. Fayerweather died?

A. I cannot tell exactly; I know he died; I cannot give the date.

46 Q. You did not go to his funeral, did you?

A. No, sir.

47 Q. When was the arrangement first made for the purchase of that land?

A. I was not a party to that.

48 Q. Who was; who attended to it?

A. Mr. Blumenthal and Mr. Samuels and Mr. Steifel.

49 Q. On behalf of the Dressed Beef Company?

A. No, on behalf of themselves at that time.

50 Q. Well, now come to the time when the United Dressed Beef Company bought the land. You took the deed on the 15th of March, 1893, didn't you?

A. I do not recollect when we took the deed.

51 Q. Was it about that time?

A. Probably.

43 52. Q. Well, who attended, on behalf of the United Dressed Beef Company, to the taking of the title?

A. The searching?

53 Q. Yes.

A. I did

54 Q. You did?

A. Yes, sir.

55 Q. And what information the United Dressed Beef Company got about the title they got from you, did they?

A. Yes, sir, from our counsel.

56 Q. And who was your counsel then?

A. Mr. Hahn.

57 Q. What was his firm?

A. Nathan L. Hahn.

44 58 Q. Well, was he in a connection with other lawyers?

A. I do not remember.

59 Q. Was not the partnership Hahn & Myers?

A. I think that was later, I do not think he was then.

60 Q. Mr. Hahn is dead I believe?

A. Yes, sir.

61 Q. When did he die?

A. He must be dead now four or five years.

62 Q. Did you see anybody about this title except Mr. Hahn?

A. No, sir.

63 Q. What information you got through Mr. Hahn, did you?

A. Yes, sir, through our counsel.

64 Q. And you did not, at the time you took the title, know anything about the title except what you got from Mr. Hahn?

A. Yes, sir.

Mr. Parsons: Before you answer the next question withhold your answer, I want to take an objection to it.

65 Q. Did you learn that the first conveyance from
45 anyone representing Mr. Fayerweather was one to Sidney Ward?

Mr. Parsons: Counsel for the executors object to this question and to this line of examination upon the ground that by no possibility is it material to any issues involved here; that it may have a bearing upon the issues in a suit against the United Dressed Beef Company pending in this Court and that the examination is obviously and unfairly conducted for the purpose of obtaining information to be used not in this suit but in that.

Mr. Bovee: I suggest that it be understood that the same objections stand as to all defendants who filed a plea and to whom notice has been given.

Mr. Blaikie: Are you empowered to speak for all?

46 Mr. Bovee: I make that suggestion. Is there any objection to that?

Mr. Sherman: I do not know that there is; if they adopt your suggestion they may do so.

Mr. Bovee: I ask the stenographer to note the same objection in behalf of the colleges that I stated I appeared for on this examination.

Mr. Fain: I ask that the same objection be noted as to Bowdoin College.

Mr. Holmes: I make the same objection as to Dartmouth College.

Mr. Stimson: I make the same objection as to Hamilton College, and a motion to strike out all the preceding

testimony, both of this witness and the other, on the ground that it is utterly irrelevant to any of the issues raised by the plea of Hamilton College.

Mr. Bishop: I join in that motion on behalf of Amherst College, Williams College and the Union Theological Seminary.

Representative of Nash & Jones: I make the same objection and motion on behalf of Columbia College.

Mr. McLaughlin: I make the same objection and motion on behalf of Adelbert College.

(Question repeated by stenographer).

47 A. I did not.

66 Q. You did not?

A. No, sir.

67 Q. You never learned that in the chain of title of the United Dressed Beef Company there were deeds to Sidney Ward?

A. That is not the question.

68 Q. That is this question. Now will you answer that?

A. Repeat that question.

69 Q. You never learned that in the chain of title of the United Dressed Beef Company there were deeds to Sidney Ward?

A. There were, yes; I thought you meant the first.

48 70 Q. When did you learn that?

A. Sometime after Mr. Blumenthal, Mr. Samuels and Mr. Steifel bought the lots.

71 Q. Can't you fix it any more specifically than that?

A. Well, I cannot remember the dates.

72 Q. Well, from whom did you understand that they bought the lots?

A. From themselves.

73 Q. Bought them from themselves?

A. I understood from themselves that they bought them.

74 Q. From whom did you understand they bought the lots?

A. From the estate of Mr. Fayerweather.

75 Q. Did you understand that they took title in their own names?

A. I do not know whether they took title; I know they bought the lots and they paid a deposit on them.

76 Q. How much deposit did they pay on them?

A. I do not know.

77 Q. How much did you hear they paid on them?

49 A. I do not remember.

78 Q. It made no impression on you?

A. No, sir.

79 Q. And did you take pains to ascertain whether they took the title in their own names or in some one's else name?

A. I did not.

80 Q. Then so far as you know nobody connected with the United Dressed Beef Company did?

A. Outside of these three people that bought the lots—there was no United Dressed Beef Company at that time.

81 Q. No, but I am asking you what you had in mind or in view at the time the United Dressed Beef Com-

50 pany took the deed. That was March 15th, 1893, was it not?

A. I do not remember.

82 Q. I think you said that nobody connected with the United Dressed Beef Company, at the time that company took the deed, knew more about the title than you did, did'nt you?

A. I said about the searching of it.

83 Q. About the record title?

A. Yes, sir.

84 Q. And what the other people in the United Dressed Beef Company learned about it they learned from you; you said that, didn't you?

A. I do not remember saying that, not necessarily.

85 Q. What do you say now?

A. I said I was doing the outside work and that I was with Mr. Hahn every day.

86 Q. No, that does not answer my question. You are giving yourself the trouble of giving something that will be stricken out.

Mr. Parsons: I object to statements of that kind by counsel.

87 Q. And what the other people in the United
51 Dressed Beef Company learned about it they learned from you; you said that, didn't you? What do you say now?

A. I say not necessarily.

88 Q. Did anybody else independently ascertain anything about it?

A. I suppose they did.

89 Q. Well, what do you know?

A. I do not know; most everybody in the company.

90 Q. You cannot tell what they learned or from whom they learned it?

A. I cannot tell what anybody else learned outside of myself.

91 Q. Was there any arrangement with the execu-
52 tors of Daniel B. Fayerweather to hasten the sale of this land by accepting a small payment in cash and taking a large purchase money mortgage, that you know of?

A. I do not.

92 Q. You do not know whether the executors undertook to dispose of the property out of the usual course of business in order to realize quickly on it?

A. I never met the executors; I do not know them.

93 Q. And if they did anything like that it did not come to your attention at the time that the United Dressed Beef Company took the deed?

A. I do not know anything about it.

94 Q. Was there a written agreement to take the title before the deed actually was executed?

A. I do not know.

95 Q. You do not know?

A. No, sir.

96 Q. Did Mr. Hahn ever tell you?

A. I do not remember.

97 Q. So far as you can remember Mr. Hahn never told you any such thing, is that right?

A. I do not remember.

98 Q. So far as you can remember Mr. Hahn never told you any such thing, is that right?

53 A. I do not remember.

99 Q. That is the best answer you can make to the last question, is it?

A. Yes, sir, just now.

100 Q. Can you remember anything that Mr. Hahn told you about that title?

A. I visited Mr. Hahn almost every day——

101 Q. No, no, answer the question.

A. What is the question?

102 Q. Can you remember anything that Mr. Hahn told you about that title?

A. I do not understand that question.

103 Q. Was there any resolution of the board of di-
54 rsctors of the United Dressed Beef Company approving of the making of the contract to take that land, to buy it, or approving of the acceptance of the deed for it?

A. I do not remember.

104 Q. Do you remember the subject being discussed at any meeting or any board of directors of the United Dressed Beef Company?

A. I do not just now.

105 Q. So far as you can remember there was no such discussion at any such meeting?

A. I cannot say that there was. There was not.

106 Q. Is there anything in existence by which you could refresh your memory as to that and then say with more confidence?

A. Well, possibly the minute book.

107 Q. Where is that now?

A. In the office of the United Dressed Beef Company.

108 Q. In your custody?

A. Yes, sir.

109 Q. I think you said you were secretary of the
55 company?

A. Yes, sir.

110 Q. Well, who practically determined the question whether you could buy that land at the price?

A. The whole company.

111 Q. You mean all the directors?

A. Well, yes, sir.

112 Q. Are there any stockholders except the directors?

A. There are.

113 Q. Well, were the stockholders consulted about it?

A. They were.

114 Q. Was any formal proposition submitted to the stockholders on that subject?

A. I do not remember.

56 115 Q. So far as you remember there was not?

A. I cannot say.

116 Q. When you took that land did you pay the full consideration named in the deed?

A. I do not remember.

117 Q. Did you take it subject to a purchase money mortgage?

A. We did.

118 Q. What was the amount of the purchase money mortgage?

A. I think it was $700,000.

119 Q. Who held it? Who holds it now?

A. I do not know.

120 Q. You do not know?

A. I do not know who holds it now.

121 Q. Do you pay any interest on it?

A. We do.

122 Q. To whom do you pay interest?

A. The real estate man of the Lehigh Valley Railroad.

123 Q. Has he got a name?

A. Has he got a name?

124 Q. Yes.

57 A. I believe his name is Schappelcutter.

125 Q. Was there ever submitted to any meeting of the board of directors of the United Dressed Beef Company any abstract of title or opinion of counsel as to the title of that land?

Mr. Parsons: One moment; do not answer that. This is objected to upon the ground that in this examination the objection has been made by the counsel for the complainants that what passes between client and counsel is privileged, and we take that same objection here subject to the ruling of the Court both on the objection taken by counsel for the complainants and on this objection if that objection is sustained.

Mr. Sherman: I do not understand this to be a judi-
58 cial ruling, although it sounds like it. Will you read it?

(Objection read by stenographer.)

126 Q. Well, do you answer the question?

Mr. Parsons: We instruct the witness not to answer.

Mr. Sherman: I object to that on the ground that the counsel for the defendants in this litigation has no capacity or right to instruct the witness called by the other side not to answer, nor to advise him in any respect.

127 Q. Well, Mr. London, what do you say?

Mr. Parsons: We instruct you not to answer.

128 Q. Do you follow Mr. Parsons' instructions?

A. I do.

Mr. Sherman: The counsel for the complainants protest against the usurpation by counsel for the defendants of the function of advising a witness called by the complainants and instructing such witness not to answer questions.

129 Q. You decline to answer?

A. I do.

Mr. Sherman: I ask to have the question read.

59

(Question No. 125 read by stenographer).

130 Q. Did you ever see any abstract of title or opinion of counsel as to the title of that land before the 15th of March, 1893?

A. I do not remember exactly when we took title.

131 Q. That was the date the deed was dated?

A. Read that question once more, please.

(Question No. 130 read by stenographer).

Mr. Sherman: Is not that so, Mr. Myers?

Mr. Myers: No, I think it was in May, if my recol-

60 lection is correct.

Mr. Sherman: The 15th of May?

Mr. Myers: Yes.

132 Q. I will make the question the 15th of May.

A. I cannot tell what the date was.

133 Q. Did you ever see any abstract of title or opinion of counsel as to the title of that land before the 15th of May?

A. I did.

134 Q. Where is it now?

A. Where is what?

135 Q. The paper you are talking about.

A. Well, I spoke to counsel——

136 Q. Oh, no, you saw a writing, that is what I mean; something you saw, nothing you heard.

A. Well, I was in Mr. Hahn's office while he was drawing up this abstract.

137 Q. Well, where is that writing now, that abstract?

A. I guess it is in our office.

138 Q. And did the company in taking title rely on that abstract?

A. We relied on our counsel.

61 139 Q. And his oral statements, is that it?

A. Yes, sir.

140 Q. To whom?

A. To most all the members of the company.

141 Q. Is that a matter of personal knowledge to you?

A. Yes, sir.

142 Q. You observed him talking to all of them, did you, in your presence?

A. At different times.

143 Q. To all of them?

A. I wont say all of them.

144 Q. Well, can you say which of them you can be positive of?

A. Yes, sir, I have seen him talking to Mr. Louis
62 Samuels and Mr. Isaac Blumenthal and some others, but I wont be positive on the others.

145 Q. You cannot be positive upon the others?

A. No, sir.

146 Q. Well, have you now stated all that you can recall as to the opinion given you prior to the 15th day of May, 1893, concerning the chain of title to that land?

A. I do not quite understand the question.

147 Q. Hear it read and I think you will. (Question repeated).

A. I cannot say that I said all.

148 Q. You do not recall anything now that you have not stated?

A. Not just now.

149 Q. And have you made a genuine effort to answer the questions fully?

A. I did. I am not feeling very well, I have sort of a grippe; I ought to be in bed.

150 Q. Well, when I have asked you these questions you have made a genuine effort to remember all you could?

A. I have answered as well as I could.

151 Q. And you have stated all that you recollect?

A. At the present time, yes.

63 Mr. Sherman: I think that is all at present. I will call Mr. Blumenthal.

64

TESTIMONY OF ISAAC BLUMENTHAL.

ISAAC BLUMENTHAL, called as a witness on behalf of the complainants, being duly sworn, testified as follows:

Direct examination by Mr. Sherman:

1 Q. What is your occupation?
65 A. I am a butcher by occupation.
2 Q. Well, are you connected with any corporation engaged in that business?
A. Yes, sir.
3 Q. What corporation?
A. The United Dressed Beef Company.
4 Q. And are you an officer of it?
A. I am the President.
5 Q. You are the President?
A. Yes, sir.
6 Q. And have you been engaged in that business on the same land where that corporation is now in business for some years?
A. Yes, sir.
66 7 Q. Since when?
A. Since 1869.
8 Q. Continuously?
A. Yes, sir.
9 Q. On your own account, I suppose, before the corporation was formed?
A. Yes, sir.
10 Q. And to whom did you pay rent?
A. Well, my original rent was paid in 1869 to a party by the name of Samuels, he was the owner of that property?
11 Q. Well, come down to 1886 for instance. To whom was it paid then?
A. Fayerweather & Ladew.

12 Q. And it was paid to them until the end of 1889 and then to Daniel B. Fayerweather?

A. Paid to Fayerweather & Ladew until such time as they owned the property, and never paid to Daniel B. Fayerweather.

13 Q. Never paid to Daniel B. Fayerweather?

A. Never; always Fayerweather & Ladew.

14 Q. I understood Mr. London to say that the title passed in December, 1889, to Mr. Fayerweather and that the rent after that was paid to him.

67 A. I do not know.

15 Q. That does not agree with your recollection?

A. No, sir.

16 Q. It does not?

A. No, sir.

17 Q. Well, who was the person who collected the rent, do you remember?

A. William Ladew.

18 Q. Was he a member of the firm?

A. No, sir.

19 Q. He was an employe of Mr. Fayerweather, was he not?

A. He was an employe of the house of Fayerweather & Ladew; he was a nephew of the original Ladew
68 who was a partner of Mr. Fayerweather's.

20 Q. And you continued to pay rent to him until when?

A. Well, we continued to pay rent until the property changed hands. I do not remember the time, I can't give you no date.

21 Q. Well, until you took the title of it you paid rent didn't you? Until the Dressed Beef Company took the title you paid rent, didn't you?

A. Yes, sir.

22 Q. You held under the lease of the Lehigh Valley until May, 1893, when you purchased, is not that right?

A. I will have to correct that.

23 Q. Certainly, if I am wrong, correct it.

A. When the property changed hands the buildings were taken down.

24 Q. Of what date are you now speaking?

A. The time I am speaking of is up to the time we paid rent.

25 Q. Well, what time is that; what year and month?

A. Well, that was in——

26 That was in May, 1893, was it not?

A. No, sir.

69 27 Q. No?

A. No, sir.

28 Q. When was it?

A. I think it was in 1892, I am not sure.

29 Q. Well, you paid rent until the deed was accepted by the United Dressed Beef Company, didn't you?

A. To whom do you mean?

30 Q. Well, do not ask me to whom you paid rent.

A. We paid no rent—there was a lapse between the time that the rents were paid until we took title to the property—there was a lapse of about eighteen months when no rent was paid because the buildings were torn down and the property was not owned by Ladew nor Fayerweather any more.

70 31 Q. That was after he had died, was it not?

A. Certainly.

32 Q. And can't you fix the date when you ceased to pay rent?

A. No, sir.

33 Q. Who is Sidney Ward?

A. Sidney Ward was the counsel for some corporation, and I presume of the Lehigh Valley Railroad.

34 Q. He was counsel for the New Jersey & New York Abattoir Company, was he not?

A. Yes, sir.

35 Q. That was formed under the control of the Lehigh Valley Road to control the traffic in their business?

A. I do not know.

36 Q. Well, that is your understanding of it, is it not?

A. Yes, sir, that is my understanding of it, but I could not swear to that.

37 Q. And who is John Sheehan?

A. John Sheehan?

38 Q. Yes.

A. He is a young man that was in the office of Mr. Leon Barnes.

39 Q. Who?

71 A. Leon Barnes' office, he was connected with Leon Barnes.

40 Q. Mr. Ward was connected in business with Alexander & Green, was he not?

A. Yes, sir.

41 Q. And his office was in their office, is that right?

A. Sheehan's office?

42 Q. No, Ward's.

A. His office was in Alexander & Green's office, yes, sir.

43 Q. And was Sheehan's office also there at one time?

A. No, sir, not that I know of.

44 Q. Was Mr. Sheehan a nominal party to the conveyance of this land?

72 A. I do not know.

45 Q. He took a deed and executed one at the same time, didn't he?

A. As far as I remember.

46 Q. From whom did you take the title to this land?

A. We took it from Ward.

47 Q. And you know that it was transferred by the New Jersey & New York Abattoir Company to Sheehan by deed of the same date as the deed to you, do you not?

A. Yes, sir.

48 Q. Well, did you as President of the company give some attention to this important transaction?

A. I did.

49 Q. And you were acquainted with it as fully as anybody in the Company, were you not?

A. Yes, sir.

50 Q. And is it true that such information as the other directors obtained was brought to you as President?

A. I would like to have you repeat that question.

51 Q. (Question repeated).

A. I believe it was; they had to bring it to me.

52 Q. Well, you think they did, don't you?

A. Yes, sir.

73 53 Q. And as far as you know they did?

A. Yes, sir, as far as I know they did, that is correct.

54 Q. And was there a meeting of the board of directors held to consider or approve the agreement for the purchase of this land?

A. Yes, sir.

55 Q. And how long after the agreement was approved was the deed to pass, thirty days?

A. Now are you speaking of the land, the purchase in 1893, or earlier, in 1891?

56 Q. I am talking about the land mentioned in a deed to the United Dressed Beef Company dated May 15th, 1893.

74 A. I understand now. What is the question?

57 Q. How long after the agreement was approved was the deed to pass, thirty days?

A. I do not know, I do not remember.

58 Q. Well was there an agreement made subject to an opportunity to counsel to examine the title, an agreement to purchase the land?

A. Yes, sir.

59 Q. And that was in writing, I suppose?

A. Probably, it ought to be.

60 Q. And have you a copy of it or a counterpart of it now?

A. I could not say that, sir, I do not know.

61 Q. With whom was that agreement made by the Dressed Beef Company?

A. The agreement of what?

62 Q. The agreement to purchase and sell this land which resulted in the deed of May 15th, 1893?

A. I do not know who it was made with.

63 Q. Don't you know with whom the agreement was made?

A. No, sir.

64 Q. From whom did you suppose you were taking
75 title?

A. From Mr. Sheehan.

65 Q. From Mr. Sheehan?

A. Yes, sir.

66 Q. Mr. Sheehan did not have the title until the date of the deed?

A. I left that entirely to our counsel at that time.

67 Q. And you do not know?

A. No, sir.

68 Q. And the directors did not know?

A. I do not know whether they did or not, I do not think they knew anything more about it than I did.

69 Q. And it follows, according to your understanding, that nobody knew that they were going to take that
76 title from Mr. Sheehan at the time the contract was made, that was a mere detail in the course of transfer was it not?

A. Very likely.

70 Q. Well, is not that your understanding of it?

A. I left it entirely to Mr. Hahn.

71 Q. I know, but you are an intelligent man and you must have had some impressions about it.

A. Yes, sir.

72 Q. Was that not your impression about it?

A. Yes, sir, very likely.

73 Q. Mr. Sheehan was a mere intermediary, a conduit of title.

A. I suppose so.

74 Q. You did not think you were dealing with him as principal did you?

A. No, sir.

75 Q. Were you dealing with the New Jersey & New York Abattor Company as principal?

A. That was entirely in the hands of my lawyer.

76 Q. I know, but I am asking you what came to you?

A. I do not know, sir.

77 Q. You do not know?

77 A. No, sir.

78 Q. And none of the board of directors knows, so far as you know, is that right?

A. I do not believe they knew any more about it than I did.

79 Q. When you took the title you took it purely upon the faith of the conclusions of your lawyer, he representing that it was a good title, is that so?

A. He told me emphatically that it was a very good title.

80 Q. And that is the extent to which you made any inquiry, was it?

A. Yes, sir.

81 Q. And you relied entirely upon his conclusion, 78 did you?

A. No, sir, I also had a talk with Mr. Sidney Ward on it.

82 Q. What had Mr. Sidney Ward to do with it at that time?

A. He said it was a very good title.

83 Q. Was that all he said?

A. That is all I talked to him.

84 Q. Is that all he said?

A. I think so.

85 Q. And so far as you know is that all he said to anybody connected with the Dressed Beef Company?

A. I do not know.

86 Q. So far as you know he made no communication to anybody else connected with it?

A. I could not say that, I do not know.

87 Q. Did he tell you that the title had passed to him from the executors of Daniel B. Fayerweather?

A. I knew that.

88 Q. Did he tell you that?

A. Yes, sir.

89 Q. And from what source did you know that otherwise?

A. Only from him.

90 Q. Only from him?

A. Yes, sir.

79 91 Q. What did he say to you about it?

A. I do not remember what was said, that is too long ago, sir.

92 Q. It made no impression on your mind?

A. Yes, it made an impression on my mind.

93 Q. Did you lay before the board of directors the statements made to you by Sidney Ward?

A. I do not remember, sir, whether I did or not.

94 Q. So far as you can remember you did not?

A. I cannot say that.

95 Q. Well, what can you say?

A. I do not know whether I laid before the board of directors what Sidney Ward said or not.

96 Q. You have no recollection of having done so?

80 A. No, sir, I have not.

97 Q. Did you ever see the deeds to Sidney Ward by the executors?

A. No, sir, not to my knowledge.

98 Q. Did you ever see any copies of them?

A. I did.

99 Q. Well, state what deeds you saw?

A. Oh, I do not remember what deeds I saw—I do not remember.

100 Q. Well, did the deeds state that the persons

named as executors of Daniel B. Fayerweather conveyed the land in question to Sidney Ward?

A. I do not know.

101 Q. That made no impression on you?

A. I do not remember the circumstances exactly now.

102 Q. Well, I do not ask for the circumstances exactly.

103 Q. Have you any recollection whatever as to the way the deeds read?

A. I believe that is what it read.

81 104 Q. You believe so?

A. Yes, sir.

105 Q. Have you a distant recollection that they did?

A. I have not.

106 Q. Was there more than one set of deeds that you saw or saw copies of?

A. I do not remember whether there was more than one or not.

107 Q. You have no recollection of any two or three sets of deeds for the same land from the executors, have you?

A. No, sir.

108 Q. Do you remember whether you had an individual deed or deeds from Mr. Bulkley, Mr. Ritch and Mr. Vaughan and their wives?

82 A. No, sir.

109 Q. You have no recollection of such a deed?

A. I have not.

110 Q. Did you ever call to the attention of the board of directors of the United Dressed Beef Company the fact that there were deeds in the title from Ritch, Bulkley and Vaughan and their wives to Sidney Ward?

A. I do not know exactly; very likely I did.

111 Q. Well, I ask you whether you have any recollection of having done so?

A. I have no recollection, sir.

112 Q. Well, did you rely upon or did the company or its board of directors rely upon those deeds in taking the title?

A. I relied on my counsel at that time.

113 Q. And that is all, is that it?

A. I knew he was fully competent; he was counsel for me for thirty years.

114 Q. And you took it all on faith, did you?

A. On my counsel's word.

115 Q. And not upon any acquaintance with the
83 facts upon which he based his opinion?

A. I suppose he examined it thoroughly, he told me so.

116 Q. You took that for granted?

A. I also——

117 Q. When he told you so you took it for granted, didn't you?

A. Well, I looked into it and read it over carefully and, as I said, I asked Mr. Ward about it at that time.

118 Q. Well, what is it you read over carefully?

A. I read the papers over carefully.

119 Q. What papers?

A. The deed.

120 Q. What deed?

84 A. The deed that you spoke of.

121 Q. What deed is that? I have spoken of several.

A. Sheehan to the United Dressed Beef Company.

122 Q. Is that all?

A. That is all that I read.

123 Q. That is all, that is the important deed to your company?

A. That is all.

124 Q. You did not read over any other papers, did you?

A. No, sir.

125 Q. And what Mr. Hahn knew or learned about the

title you do not know except that you relied upon his performing his work with skill and ability, and you relied upon his conclusions being the proper conclusions from the facts that he learned; is that so?

A. I knew that he was a good lawyer.

126 Q. I know; but do not answer something that I did not ask you.

A. Well, that is all that I can answer.

127 Q. Wont you hear the question read, if you please.

85 (Question No. 124 read by the stenographer.)

A. I did.

128 Q. That is so, is it?

A. Yes, sir.

Mr. Sherman: I ask the Examiner to adjourn the further taking of testimony to to-morrow morning at ten o'clock.

Mr. Parsons: We object.

The Witness: I cannot be here to-morrow morning.

Mr. Sherman: I do not ask you to be here to-morrow.

Mr. Myers: Do you want Mr. London here to-morrow?

Mr. Sherman: No; in case our certificate requires

86 it.

I will notify you.

TESTIMONY OF H. B. VAUGHAN.

FAYERWEATHER
vs.
RITCH,

87 REYNOLDS
vs.
RITCH.

NEW YORK, January 3rd, 1901.

Met pursuant to adjournment. Present: The Examiner, Mr. Parsons, Mr. Carnochan, Mr. Bovee, Mr. Blaikie, Mr. Sherman, Mr. Stimson, Mr. Bishop, Mr. McLoughlin, Mr. Fain
88 and a representative of Nash & Jones.

HENRY B. VAUGHAN, called as a witness on behalf of the complainants, being duly sworn, testified as follows:

Direct examination by Mr. Sherman:

1 Q. Mr. Vaughan, do you recall a letter purporting to be signed by Daniel B. Fayerweather on the 15th of November, 1890, addressed to you and to Mr. Myrick?

A. I do not recall a letter.

2 Q. Do you recall the circumstance of your having prepared a letter so addressed on the morning of that day which was signed by Mr. Fayerweather?

A. I think, Mr. Sherman, that is something that occurred between Mr. Fayerweather and myself in his lifetime, and I shall decline to answer any question.

3 Q. Have you not disclosed the contents of that letter on various occasions since Mr. Fayerweather's death?

A. I decline to answer any question.

4 Q. Have you not recited in the deed of gift pur-
89 porting to be signed by you that in substance and effect the disposition of $100,000 of the estate of Mr. Fayerweather was by the deed of gift made by you and the other executors in pursuance to the authority or expression of desire contained in such a letter?

Mr. Parsons: We object to that. The deed of gift will speak for itself.

5 Q. Will you answer, Mr. Vaughan?

A. The same answer.

6 Q. Do you claim the right to have disposed of $100,000 of Mr. Fayerweather's estate upon the authority of a writing and to withhold the information or testimony as to the contents of that writing?

A. Same answer.

90 7 Q. You decline to answer that?

A. Yes.

8 Q. Where is that letter now?

A. I decline to answer.

9 Q. When did you last see it?

A. I decline to answer.

10 Q. Do you know where it is now?

A. I decline to answer.

Mr. Sherman: I request the examiner to certify the record to the Court for its action upon the propriety of the witness' refusal to answer, and for such steps as the Court may deem fit.

(The Examiner so certifies.)

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

FAYERWEATHER
vs.
91 RITCH, *et al.*

MOTION TO REQUIRE WITNESSES TO ANSWER QUESTIONS.

Lacombe, *Circuit Judge.*

The points raised here have already been considered, and in this very case, when testimony was being taken under the plea of Hamilton College. While myself of the opinion that the evidence sought to be elicited by the questions is irrelevant to the issues raised by the plea of *res adjudicata*, the Supreme Court rule as interpreted in Blease *vs.* Garlington, 92 U. S., requires the answer
92 to be preserved, so that in the event of the appellate tribunal reaching a different conclusion as to relevancy, there may be no necessity of sending the suit back for further testimony.

The objections that questions 102, 108 and 109 put to the witness Myrick are irrelevant to the issues are therefore reserved for disposition at final hearing, and the Examiner will take down the answers subject to such objections. If the witness claims some privilege and declines to answer, application may be made to punish him for contempt; upon which application he may be heard in support of his alleged privilege. If his contention be an arguable one, even though it does not convince this court, opportunity to review may be given as in the case of Mr.

Butler's claim of privilege which was heretofore raised in this suit.

As to the witness Vaughan, a similar disposition will be made. He should answer questions 3, 8, 9 and 10. When these are answered an intelligent ruling can be made on question 2.

93

94

FAYERWEATHER
vs.
RITCH,

REYNOLDS
vs.
RITCH.

95

NEW YORK, January 7th, 1901.

Met pursuant to adjournment. Present: The Examiner, Mr. Blaikie, Mr. Parsons, Mr. Stimson, Mr. Bovee, Mr. Bishop, Mr. Carnochan and Mr. McLaughlin.

96 Adjourned to January 9th, 1901, at 2 P.M.

TESTIMONY OF H. B. VAUGHAN.

FAYERWEATHER
vs.
RITCH,

REYNOLDS
vs.
97 RITCH.

NEW YORK, January 9th, 1901.

Met pursuant to adjournment. Present: The Examiner, Mr. Sherman, Mr. Blaikie, Mr. Parsons, Mr. Bovee, Mr. Carnochan, Mr. Fain, Mr. McLaughlin and a representative of Messrs. Root, Howard, Winthrop & Stimson.

98

Continuation of the examination of Henry B. Vaughan.

By Mr. Sherman.

11 Q. Mr. Vaughan, I read you the decision rendered by Judge Lacombe upon your refusals to answer:

"MOTION TO REQUIRE WITNESSES TO ANSWER QUESTIONS.

"LACOMBE, *Circuit Judge.*

"The points raised here have already been considered, and in this very case, when testimony was being taken

under the plea of Hamilton College. While myself of the opinion that the evidence sought to be elicited by the questions is irrelevant to the issues raised by the plea of *res adjudicata*, the Supreme Court as interpreted in Blease *vs.* Garlington, 92 U. S., requires the answer to be preserved, so that in the event of the appellate tribunal reaching a different conclusion as to relevancy there may be no necessity of sending the suit back for further testimony.

"The objections that questions 102, 108 and 109 put
99 to the witness Myrick are irrelevant to the issues are therefore reserved for disposition at final hearing, and the examiner will take down the answers subject to such objections. If the witness claims some privilege and declines to answer, application may be made to punish him for contempt; upon which application he may be heard in support of his alleged privilege. If his contention be an arguable one, even though it does not convince this court, opportunity to review may be given as in the case of Mr. Butler's claim of privilege which was heretofore raised in this suit.

"As to the witness Vaughan a similar disposition will be made. He should answer questions 3, 8, 9 and 10.
When these are answered an intelligent ruling can be
100 made on question 2."

I now ask you question 3rd:

"Q. Have you not disclosed the contents of that letter on various occasions since Mr. Fayerweather's death?"

Mr. Parsons: The defendants object to the question for the reason that Judge Lacombe's decision says: "While myself of the opinion that the evidence sought to be elicited by the questions is irrelevant to the issues raised by the plea of *res adjudicata*, the Supreme Court rule as interpreted in Blease *vs.* Garlington, 92 U. S., requires the answer to be preserved, so that in the event of the appellate tribunal reaching a different conclusion as

to the relevancy there may be no necessity of sending the suit back for further testimony"; that we claim, as stated by Judge Lacombe to be his opinion, that the question is irrelevant to the issues raised by the special plea; but assuming that the counsel for the complainants claims, and if insisting upon an answer to his question maintains, that the question is relevant to the issues raised by the plea of *res adjudicata*, etc., we for that reason do not instruct the witness to decline to answer.

The Witness: Shall I answer?

101 Mr. Parsons: If the counsel requires you to answer you must answer.

Mr. Sherman: The question was put for the purpose of having it answered.

The Witness: Be kind enough to repeat the question.

Mr. Sherman: Read it.

(Question No. 11 repeated by stenographer)

A. I do not know the paper as a letter.

12 Q. Whether you choose to describe it as a letter, do you understand to what paper the question is intended to refer?

A. I think I understand what paper the question refers to.

13 Q. Well, will you answer the question as applied
102 to that writing?

A. I do not know that its contents have been disclosed at various times.

14 Q. The question is, have you not disclosed its contents at various times since Mr. Fayerweather's death?

A. Not to my knowledge.

15 Q. I ask you the eighth question: "Where is that letter now?"

A. I do not know.

16 Q. I ask you the ninth question: "When did you last see it?"

Mr. Parsons: Same objections as to the question No. 3, and same course of action.

A. I do not recall.

17 Q. I ask you the tenth question: "Do you know where it is now?"

Mr. Parsons: Same objection and same course of procedure.

A. I do not.

18 Q. Did you see it prior to the signing of the so-called deed of gift on the 24th of February——?

A. Excuse me, I am hard of hearing; if you wish
103 me to hear you will have to stand where I can hear you.

19 Q. Mr. Bonynge will read the question to you if you desire after I have framed it. Did you see it prior to the signing of the so-called deed of gift on the 24th of February, 1891?

A. I cannot now recall.

20 Q. Was it ever signed by Mr. Fayerweather?

A. Yes, sir.

21 Q. Did you see him sign it?

A. Yes, sir.

22 Q. Where?

A. At his house.

23 Q. 11 East 57th Street?

104 A. Yes, sir.

24 Q. When?

A. I do not now recall what date.

25 Q. Was it the day it bears date?

It was so intended.

26 Q. The question is repeated: Was it the day it bears date?

A. It was so intended.

27 Q. The question is repeated: Was it the day it bears date?

A, It was so intended.

28 Q. Is that the only answer you can make to that question?

A. Yes, sir.

29 Q. You wrote the letter yourself, didn't you?

A. Yes, sir.

30 Q. Did you write it in Mr. Fayerweather's presence?

Mr. Parsons: That is not one of the numbered questions, is it?

Mr. Sherman: No.

Mr. Parsons: This being additional to the numbered questions upon which Judge Lacombe ruled, we take the same objection, that it is irrelevant; we maintain
105 that Judge Lacombe's opinion in reference to irrelevancy applies, and that he has decided that, in his opinion, it is irrelevant. We assume that counsel in asking the question stands upon his position as counsellor of the court and the claim that the question is relevant, and that if he insists upon an answer he thereby expresses himself to that effect, and that being so we do not instruct the witness to decline to answer.

Mr. Sherman: Counsel for the complainants objects to the protracted, unprecedented and improper placing upon record at the expense of the complainants of the various mental processes of counsel for the defendant and the deductions which he sees fit to make, and contends that the burden of taking the testimony on the part of the
106 complainants cannot properly be increased by such reflections upon the record. The question is repeated.

The Witness: Be kind enough to read the question.

(Question No. 30 repeated by the stenographer.)

A. I cannot now recall.

31 Q. Do you recall whether or not you wrote it?

A. I have already answered the question.

32 Q. The question is repeated: Do you recall whether or not you wrote it?

The Witness: Will you please give my answer to that question when it was answered before.

(Previous testimony read by stenographer.)

Mr. Sherman: Then that question is withdrawn.

33 Q. Who was present when you wrote that letter besides Mr. Fayerweather and yourself?

A. I do not recall.

32 Q. Are you making a genuine effort to recall?

The Witness (to Mr. Parsons: Do you wish me to answer that question?

Mr. Parsons: I do not object.

107 The Witness: I do not think he has a right to ask that.

Mr. Parsons: Neither do I; I think the question is insulting, but none the less I think you had better answer.

A. Yes, damn you!

Mr. Parsons: No, no, Mr. Vaughan.

Mr. Blaikie: Take that down.

The Witness: Yes, take it right down.

35 Q. Where did you write it, in Mr. Fayerweather's room?

A. I do not now recall.

37 Q. Was he in bed or in a chair when you wrote it?

The Witness: I beg your pardon, I did not hear that

108 question.

(Question No. 37 repeated by the stenographer.)

A. I cannot now recall.

Mr. Parsons: We want to save all the expense we can to the complainants.

38 Q. Was he in the sitting room of the second story of his house when you wrote that letter?

A. I cannot now recall; my impression is that he was in the bedroom.

39 Q. Is your impression any better now as to whether he was in bed or in a chair?

A. No, sir; you are asking me to testify to things that happened ten years ago.

40 Q. Can you answer the question?

A. No more than I have answered.

41 Q. Do you mean that your memory does not now serve you to enable you to say whether Mr. Fayerweather was in bed or in a chair at the time you wrote that letter, is that what you say?

A. The same answer I made before.

42 Q. The letter to which I refer is as follows: "40 East 57th Street (by which I suppose 11 East 57th Street is meant), November 15th, 1890. Mr. H. B. Vaugh-
109 an and Mr. F. B. Myrick. Gentlemen: In addition to the sums already disposed of by you I wish you to give a further sum of about one hundred thousand dollars in securities now in my box of which Mr. Myrick has the key, the securities taken at their value to-day, to my niece Lucy J., wife of Morris B. Beardsley, and this letter will be sufficient authority for so doing. Truly yours, D. B. Fayerweather." What were the sums already disposed of by you referred to in that letter?

Mr. Parsons: Wait a moment. Objected to by counsel for the defendants upon the ground that the question and the subject are, quoting from the language of plaintiff's counsel at page 71, "entirely outside and unrelated
110 to any question presented by the pleas as to the existence or effect or validity of the adjudication by the five colleges action," and that the principle as also claimed by the counsel for the complainants upon which the examination is to be conducted is, that the testimony is to be limited to evidence which is related to that subject. The counsel for the defendants claim that this is not related to the subject and that the counsel for the complainants has no right to pursue the inquiry or to ask this question unless upon his professional insistence that the subject does relate to the estoppel created by the special plea. If the question is pressed it will be understood that the counsel does make that insistence, and the witness will not be instructed to decline to answer.

Mr. Sherman: Counsel for the complainants repeats his protest against the placing upon the record of the operations of the mind of the counsel for the defendants. Read the question to the witness, please.

(Question No. 42 repeated by the stenographer.)

A. I do not recall.

43 Q. Had you previously to that date disposed of any sums belonging to Mr. Fayerweather?

Mr. Parsons: The same objection and course of pro-
111 cedure in reference to this question and to all questions of a similar character.

A. I do not recall.

44 Q. Did Mr. Myrick ever state to you that he had disposed of any sums to which that language in that letter could apply?

A. I do not recall.

45 Q. As you drew the letter yourself are you able to state whom you had in mind, as to which of you, you had in mind when you referred to sums already disposed of by you?

A. I probably knew ten years ago when I wrote the letter; I do not recall now.

46 Q. Did you receive instructions on the morning
112 of November 15, 1890, from Mr. Fayerweather concerning a codicil to be executed by him:

Mr. Parsons: Same objection and course of procedure.

A. I presume I did, as there was a codicil executed that day, but I do not recall the instructions.

47 Q. Permit me to see if I can refresh your memory. Did you on the morning of November 5, 1890, receive from Mr. Fayerweather instructions for a codicil to be executed, the substance of which you wrote on the back of an envelope which has been marked Exhibit O-a, and which writing so made by you is as follows: "Clause about Miss Joyce. About the men being with him. More

institutions for benefit. Mrs. Beardsley amount $100,000 in bonds. Strike out about servants in his employ."

Mr. Parsons: Is that read from testimony given by him?

Mr. Sherman: Do you ask me that in order to have it stated on the record or for your information?

Mr. Parsons: No, so that he may know what you ask him to refresh his recollection from.

Mr. Sherman: He is perfectly at liberty to refer to it as far as I am concerned if he wishes to do so.

Mr. Parsons: I think he had better do so. I understand this is testimony that you have previously given, Mr. Vaughan, and you may refresh your memory by it if you can.

113

(Witness refers to printed book.)

The Witness: This is not my evidence.

Mr. Parsons: Mr. Sherman says it is.

Mr. Sherman: This is the five college record, that is all I know about it.

Mr. Parsons: Mr. Sherman, you are mistaken about the matter.

Mr. Sherman: I have not looked at the context.

The Witness: Will you read the question?

(Question No. 47 repeated by the stenographer.)

114 A. There was a conversation between Mr. Fayerweather and I one afternoon, and I have some recollection of writing on the back of an envelope, whether this is a correct report of what I wrote or not I do not remember now; I cannot tell, I cannot recall.

46 Q. Do you recall any part of the phrases in the question as having been so written by you?

The Witness: I beg your pardon, I did not understand.

Mr. Sherman: Read it, please.

(Question No. 48 repeated by the stenographer.)

A. Phrases in the question, what phrases do you re-

fer to? Repeat the phrases which he wishes me to comment upon.

49 Q. They are there in the book.

A. These phrases do you refer to?

50 Q. Certainly.

Mr. Sherman: Is there any question about it, that that was what was written by him?

Mr. Parsons: We make no question about it, if you ask us that. It corresponds with my recollection of it, but Mr. Vaughan is under oath. I think that is ac-
115 curate; we printed it.

Mr. Sherman: I rather think that nothing could have got into that record that was not an exact transcript of an exhibit.

A. Well, this phrase here, "Miss Beardsley amount $100,000 in bonds," that refers to that letter.

51 Q. Do you recall any other of the phrases?

A. Yes. "More institutions for benefit," that I think was more colleges that were to receive money, I think that referred to that.

52 Q. Well, there was such a phrase written by you on such an envelope, was there not?

A. I wrote that envelope; if that is a correct record of the envelope I wrote those things.

116 53 Q. Well, have you the envelope in your possession now?

A. No, sir.

54 Q. Do you know where it is?

A. No, sir.

55 Q. When did you last see it?

A. My impression is the last time I saw it was when it was produced in court.

56 Q. In what court, in the Supreme Court?

A. Well, that is more than I can recall now.

57 Q. Before what judge, do you recall that?

A. Sir?

Mr. Sherman: Read it.

(Question No. 57 repeated by the stenographer).

The Witness: No, sir.

58 Q. Was it produced before the Surrogate?

A. I cannot recall.

59 Q. You cannot recall; is that the answer?

A. Yes.

60 Q. Well, do you recall now that you wrote on an envelope on the morning of the 15th of November during a conversation with Mr. Fayerweather some phrases, among which were, "Mrs. Beardsley amount $100,000 in bonds," and "more institutions for benefit?"

117 A. If that is a correct record of what was on that envelope I wrote it, but I do not remember what I wrote now.

61 Q. You have no independent recollection whatever on the subject; do you mean that?

A. No definite.

62 Q. You have no recollection sufficiently definite to enable you to say as a matter of memory that you wrote upon that envelope "more institutions for benefit," is that right?

A. It is an impression of mine that I so wrote, but I cannot——

63 Q. But that is as positive as you are able to be about it?

118 A. Yes, sir.

64 Q. Now how long did that interview last between Mr. Fayerweather and yourself?

A. I cannot recall.

65 Q. Well, did you go there to the house about ten o'clock in the morning and remain there until about twelve o'clock on that day?

A. I cannot now recall.

66 Q. You cannot recall?

A. No, sir.

67 Q. Can you recall whether you were there twenty minutes or two hours or any intermediate precise time?

A. My impression is that it was longer than two minutes but whether it was two hours I cannot now recall.

68 Q. Well, can you say that it was more than twenty minutes?

A. No, sir.

69 Q. Are you able to recall what Mr. Fayerweather said to you during the time you were there?

A. Not definitely.

70 Q. Will you state what he did say to you as definitely as you can state?

119 Mr. Parsons: Same objection which has been heretofore taken and the same course is adopted by the counsel for the defendants with respect to the relevancy of the inquiry and the position which the counsel for the complainants take in insisting upon an answer to the question.

A. I cannot undertake to say what occurred ten years ago.

71 Q. Is that the best answer you can make to the last question?

A. Yes, sir.

72 Q. Was the envelope in question written before or after——

A. I beg your pardon, I did not hear that.

120 73 Q. Mr. Bonynge will read it to you as soon as it is completed (continuing)—the execution of the codicil of Mr. Fayerweather which purports to have been executed by Mr. Fayerweather on the day of his death?

The Witness: Read it now.

(Questions Nos. 72 and 73 repeated by the stenographer.)

A. My impression is that the memoranda on the envelope were made before.

74 Q. Do you mean that that is your best recollection when you say your impression?

A. Yes, sir.

75 Q. Well, did you in what you wrote on the envelope set down what you wished or what Mr. Fayerweather declared that he wished?

A. My impression is that I intended to set down what Mr. Fayerweather wished.

76 Q. That is your best recollection of what occurred, is it?

A. Yes, sir.

77 Q. And there is not set down in that list of phrases which I have read in a preceding question anything which originated with you, but only what originated with
121 Mr. Fayerweather, is that right?

A. At the expiration of ten years I am not able to answer that question definitely.

78 Q. What is your best recollection about it?

A. I have already answered what my best recollection is.

79 Q. What is your best recollection about it? I do not understand that you have answered this question; perhaps I am wrong.

A. Be kind enough to repeat my answer.

(Testimony read by the stenographer.)

80 Q. It may be then that for aught you can re-
122 member to the contrary that in those phrases are guides for the making of a codicil not expressing anything which Mr. Fayerweather desired, you do not mean that, do you?

A. I should think there would not be.

81 Q. Well, is your memory able to exclude that proposition?

The Witness: Just read that previous question again?

(Question No. 80 repeated by the stenographer.)

The Witness: I do not understand that question. Just read it again.

(Question No. 80 again repeated by the stenographer.)

The Witness: No.

82 Q. Then as I understand you, whatever your memory is, it is at least positive about this point, that in the memoranda on the envelope there is nothing but what Mr. Fayerweather expressed as his desire as to what should be incorporated in the codicil?

A. That is my impression.

83 Q. You mean by that, that that is your recollection?

A. That is my impression after ten years.

Mr. Sherman: Counsel for the complainants calls
123 upon the counsel for the defendant Thomas G. Ritch and the defendant Henry B. Vaughan and the defendant Justus L. Bulkley to produce the writing purporting to be signed by D. B. Fayerweather, dated November 15, 1890, addressed to Mr. H. B. Vaughan and Mr. F. B. Myrick, and which was marked upon the probate proceeding before the Surrogate Exhibit D.

Mr. Stenographer, please note that no response is made to the demand.

Counsel for complainants calls upon these same counsel to produce an envelope which was marked Exhibit O—a in the so-called five college action upon the back of which appear the words "Clause about Miss Joyce. About the men being with him. More institutions for benefit.
124 Mrs. Beardsley amount $100,000 in bonds. Strike out about servants in his employ."

Mr. Parsons: Counsel for the defendants state that if the papers called for are in their possession they will produce them if the counsel for the complainants will state upon his professional honor that he considers them relevant to the issue presented by the special plea; otherwise they decline to assist in an examination which they regard as entirely irrelevant to the issue, which Judge Lacombe in his decision has expressed as being in his opinion entirely irrelevant to the issue.

Mr. Sherman: Counsel for the complainants states that he makes the pending demand pursuant to his judg-

ment as to what evidence the complainants are entitled to introduce in this record in the existing condition thereof; considering not only the pleadings, which are of diversified character, some of the defendants having interposed answers at large in the cause, and these present defendants, to whose counsel this demand is addressed, having, it is true, put upon file an alleged plea and an answer in support thereof, but having gone outside the issue and having thus gone into the evidence at large, having therefore waived their plea, and having therefore opened the
125 door to the complainants, if it were not otherwise opened to them, on their part to go into evidence at large, and in this connection counsel for complainants refers to the depositions already taken on notice on behalf of these defendants, including the deposition of John B. Reynolds, and counsel for the complainants repeats his request for the writings.

Mr. Parsons: Counsel for the defense are willing to do exactly what they have stated. If the counsel for the complainant will state upon his professional honor that he claims this testimony to be relevant to the issue upon which this examination is being taken they will produce these papers if they are in their possession or can be found, that they repeat here a tender of the stipula-
126 tion heretofore offered that the testimony upon this examination shall be limited to that which is relevant to the issue created by the special plea, and that if counsel for complainants does not accept this stipulation, but upon the contrary avails of the opportunity to elicit general testimony as to which the counsel for the defense take the position that it is not relevant to any issue suggested by the bill, they decline to assist the counsel in conducting the examination in any way.

Mr. Sherman: Counsel for the complainants states that the conclusion of the counsel for the defendants not to produce the writings in question obstructs and pre-

vents the further examination of this witness and therefore rests with it.

Mr. Parsons: Mr. Vaughan we have a right to cross examine you.

Cross Examination by Mr. Parsons.

84 XQ. In response to a question put to you by the counsel for the complainants, in respect of which there was used at the time the expression that it was insulting, you added to your direct answer an expletive. Did
127 you intend thereby to treat the court with disrespect?

Mr. Sherman: One moment. I object to the question on the ground that it is not true that the question put to this witness was insulting or intended to be insulting, and that it is improper for the counsel to embody any such conclusion or imputation in the question he has asked the witness.

Mr. Parsons: Give your answer.

A. I intended no disrespect to the court.

85 XQ. So far as it may be claimed to show any disrespect to the court or to the examiner, do you wish to have an apology put upon the record?

The Witness: I beg your pardon.

128 Mr. Parsons: Read the question.

(Question No. 85 repeated by stenographer.)

A. So far as applies to the court, yes.

86 XQ. And the examiner?

A. I have no respect for him whatever.

Mr. Blaikie: Take that down.

Mr. Parsons: Yes, by all means.

87 XQ. Let me call your attention to the fact that Mr. Shields is the examiner.

A. I beg your pardon, I thought you meant Mr. Sherman; I intended my remark there to apply to Mr. Sherman. I apologize to Mr. Shields.

88 XQ. Mr. Vaughan, you have testified that you have impressions but have not definite recollection in respect to certain occurrences which took place ten years or more ago. In reference to those occurrences do you remember that you as a witness were examined before Mr. Surrogate Ransom at a period not long after Mr. Fayerweather's death?

A. I remember being examined before Mr. Ransom, Mr. Surrogate Ransom, but how far his examination went into those occurrences I cannot now recall. If you
129 will permit me, Mr. Parsons, I will say that what I testified before Mr. Surrogate Ransom I believed to be true at the time I testified.

89 XQ. And was your recollection then fresh upon these subjects?

A. It was fresh, it was then within six months anyway of their occurrence.

90 XQ. Were you examined on that occasion by Messrs. Coudert of counsel for Mrs. Fayerweather and Rollins of counsel for Miss Emma Fayerweather and Mrs. Achter?

A. I can recall I was examined by Mr. Coudert, but whether by Mr. Rollins or not I do not now recall.

91 XQ. Do you remember that Mr. Rollins was associated with Mr. Coudert?

130 A. Oh, I remember that Mr. Rollins was in court and was associated in the case, yes.

92 XQ. Inasmuch as the counsel for the complainants has insisted upon examining you in reference to what occurred between Mr. Fayerweather and yourself on November 15, 1890, I desire that you will refresh your recollection by a reference to the testimony which you gave before Mr. Surrogate Ransom, and shall wish when you have refreshed your recollection to ask you to state what occurred between Mr. Fayerweather and yourself on that day. How long will it take you to do it?

A. I do not know where the record is, I do not

know that I have a copy of the record. I had, but I do not know where it is now.

93 XQ. Well, can you, if a copy of the record is furnished to you, be prepared to give this testimony at a succeding appointment?

A. I am willing now to say that what I said then was the truth. I will read that testimony over again and read it here if you want me to. I do not think it is fair——

Mr. Parsons: Answer question, please.

131 94 XQ. If Mr. Sherman desires the testimony to form part of this record, he having taken the position that it is relevant, we are willing that the testimony upon the subject given by you before Mr. Surrogate Ransom shall be read; and if Mr. Sherman does not ask to have it read, we desire to have you refresh your recollection by reference to that testimony and then to state what occurred between Mr. Fayerweather and yourself on that date, November 15, 1890, and to state also the testimony upon the subject which you gave before Mr. Surrogate Ransom and the date when it was given. Can you do that at the next appointment?

A. Yes, I can read the record.

Mr. Parsons: Have you anything further to-day, Mr. Sherman?

132 Mr. Sherman: Yes, if you are through with Mr. Vaughan.

Mr. Parsons: I am through until he refreshes his recollection.

Mr. Sherman: Would it not be well to put something on the record in disposing of Mr. Vaughan as a witness?

Mr. Parsons: The further cross examination of Mr. Vaughan is adjourned until the next appointment in this proceeding.

Mr. Sherman: Counsel for complainants objects to the adjournment for the purpose of cross examination of the witness upon subjects as to which he has declared that he

has no present recollection for the purpose of allowing the cross examiner to continue with the same subject after the witness shall have refreshed his memory, that being no proper part of a cross examination based upon the testimony heretofore given by this witness; and insists that the cross examinatiow of this witness shall be concluded before the record proceeds with another witness.

Mr. Parsons: We say nothing.

Mr. Sherman: Counsel for the complainants understanding that the proposition to cross examine upon mat-

ters which he is to learn hereafter is waived, now re-
133 calls Mr. Myrick.

Mr. Parsons: The counsel for the defense do not believe that counsel for the complainants thinks that further examination of Mr. Vaughan is waived. There is nothing to justify it. What has occurred puts beyond question just the reverse.

Mr. Sherman: Mr. Myrick, will you take the stand?

134

TESTIMONY OF F. B. MYRICK.

Continuation of the examination of *F. B. MYRICK.*

By Mr. Sherman.

110 Q. Mr. Myrick, have you heard the decision of Judge Lacombe read?

A. I have not heard it read, I glanced through it myself the other day.

111 Q. Well you are directed as I understand it to answer questions 102, 108 and 109.

135 Mr. Parsons: The counsel for the defense being of the opinion, and Judge Lacombe in his decision having himself said that he is of the opinion that this is irrelevant to the issues raised by the plea of *res adjudicata*, they object to it as irrelevant and will only abstain from instructing the witness not to answer upon the assumption, if the counsel for the complainants insists upon the question, that he as a counsellor of the court takes the position that the testimony is relevant to that issue.

Mr. Sherman: Counsel for the complainants again protests against the mental operations of the counsel for the defendants being placed upon the record and declines to adopt their theories or deductions or pay any attention to them.

136 Mr. Parsons: In this connection they tender the same stipulation with reference to irrelevant testimony which has been heretofore tendered by them, and reserve their right to take such objection as they may presume to be proper in respect of that which they claim to be a gross abuse of professional power, not a professional right or privilege.

Mr. Sherman: Counsel for the complainants repeats his protest.

112 Q. Now Mr. Myrick, I ask you question 102: "Q. Were you paid by Daniel B. Fayerweather in his lifetime, within a month before his death, the sum of $25,000 for your personal use?"

A. I was given that amount; not paid, given.

113 Q. When?

Mr. Parsons: Same objection and the same course of procedure.

The Witness: Shall I answer?

Mr. Parsons: Certainly.

A. On Monday, November 10th.

Mr. Parsons: Some year or another. Give a year.

The Witness: 1890.

114 Q. In his house?

137 A. In his house.

115 Q. Was it paid to you in cash or by a check?

A. It was not paid to me in cash or check.

116 Q. In what manner was it paid to you?

A. He told me to take that amount, and by an after arrangement it was taken in bonds.

117 Q. Who made the arrangement?

A. I did with Mr. Fayerweather.

118 Q, When?

A. Wednesday morning about 10 o'clock of the same week.

119 Q. November 12, 1890?

A. Yes, sir, November 12th, Wednesday morning.

120 Q. That was at his house, was it?

138 A. At his house.

121 Q. In his bedroom?

A. In his bedroom.

122 Q. Was he in bed or in a chair?

A. He was in bed.

123 Q. Was any one else there?

A. There was not.

124 Q. Was any one else present besides you two on the 10th when he directed you to take that?

The Witness: These questions are all outside the two that I was called upon to answer. These are new questions.

Mr. Parsons: To this question and to all similar ques-

tions and to this line of examination the counsel for the defense by way of objection pursue the same course heretofore taken by them; but the line of examination being persisted in, and assuming therefrom that counsel for the complainants maintain that it is testimony which is relevant to the issue under the special plea, they abstain from instructing the witness not to answer.

Mr. Sherman: Read the question, Mr. Bonynge.

(Question No. 124 repeated by stenographer.)

139 A. Yes, sir.

125 Q. Who was?

A. Mr. Vaughan.

126 Q. Any one else?

A. No, sir.

127 Q. What time of day was it?

A. It was close to 10 o'clock, it might have been 10:30.

128 Q. In the morning?

A. In the morning, yes, sir.

129 Q. How long were you there on that occasion?

A. Do you mean the entire stay?

130 Q. Yes, on that occasion?

A. The time in the house, well that must be, I guess 140 I can give you an impression, because there were two——

131 Q. Oh, no, give us your best recollection?

A. About an hour.

132 Q. And when did you arrive on that occasion?

A. It must have been close to 10 o'clock, it might have been half-past nine.

133 Q. And then you went away about eleven?

A. I should think fully as early as that.

134 Q. Eleven or earlier, is that what you mean?

A. Well, I am certain it was not later, I know that.

135 Q. And on the 12th, when did you arrive on that occasion at Mr. Fayerweather's house?

A. Well, that was close to 10 o'clock, it was between 9 and 10, I cannot give the exact time.

136 Q. And how long were you there on that occasion?

A. Well, I should say not over a half an hour.

137 Q. Did you find Mr. Vaughan at the house when you arrived on the 10th, or did he come in after you?

A. No, he was there.

138 Q. Was he in Mr. Fayerweather's bedroom?

A. I do not know.

139 Q. Well, was it not in Mr. Fayerweather's bed-
141 room that he made this statement to you, that Mr. Fayerweather made this statement to you?

A. No, sir, he was sitting in a chair in the front room, what we call the sitting room.

140 Q. That was an invalid's chair, was it that rolled about?

A. No, it was his ordinary big arm chair.

141 Q. No wheels on it?

A. Not to my remembrance. As I remember it was the same old chair that he always sat in when I visited him.

142 Q. Well, I think you said that on the 12th he was in bed?

A. He was in his bed, yes, sir.

142 143 Q. And was Mr. Vaughan there when you arrived?

A. He was not.

144 Q. Did he come into the room while you were there?

A. He did not.

146 Q. What securities were applied to this gift of $25,000.

Mr. Parsons: The same objection and the same course of procedure with reference to the position of the counsel for the complainants insisting upon an answer.

Mr. Sherman: Continue, please.

A. I think that there were some of the Milwaukee

& Northern six per cent. bonds, some Cleveland & Pittsburg. I do not remember with regard to whether there was any Chicago, Rock Island & Pacific among them at this moment, and——

146 Q. Well, where were they?

A. They were in Mr. Fayerweather's deposit box in the Nassau vault which I controlled, of which I had one key.

147 Q. And there was similar securities of the same amount paid to Mr. Vaughan about the same time pursuant to a similar direction?

Mr. Parsons: Same objection to this question and
143 line of examination and to the subject, and the same course of procedure with reference to the position taken by the counsel for the complainants in requiring an answer to the question. The counsel for the defense abstain from instructing the witness not to answer upon the assumption that the counsel for the complainants maintains this to be relevant to the issue.

Mr. Sherman: Counsel for the complainants again protests against the counsel for the defendants putting upon the record protracted reasons why they abstain, stating that all they need to do or can with propriety do is to abstain from saying anything about it. Now will you read the question?

144 (Question No. 147 repeated by the stenographer.)

The Witness (to Mr. Parsons): Do you fail to give me directions?

Mr. Parsons: I do not direct you not to answer. The counsel insists that you shall answer.

A. Under the objections that I presented at the last examination I decline to answer, but being guided by the general rule laid down by Judge Lacombe I will answer, that a similar amount was paid to Mr. Vaughan.

148 Q. And what is the answer, being given?

A. A similar amount was paid to Mr. Vaughan.

149 Q. Under like directions?

A. Under like directions in my presence.

150 Q. Well, do you mean by that that you and he together took from the box you have described securities each to the amount of $25,090 pursuant to that direction?

A. Yes, sir.

151 Q. But not in Mr. Fayerweather's presence?

A. No, he was at home sick.

152 Q. And this happened at the Nassau vault, did it?

A. This happened at the Nassau vault.

145 153 Q. And were there securities disposed of within that week to the amount of $175,000 by Mr. Vaughan and yourself belonging to Mr. Fayerweather?

Mr. Parsons: The same objection and the same course of procedure.

154 Q. You heard the letter read, didn't you?

A. I heard you reading that letter, yes, sir. Do you wish——

Mr. Parsons: Mr. Myrick, I wish to remind you that Judge Lacombe has said in his opinion that if you claim privilege you can stand upon your privilege subject to a future ruling by him.

Mr. Sherman: No, he said you could get into con-
146 tempt and go to the Circuit Court of Appeals; that is what he said. Mr. Butler had the eminent services of Mr. Choate on that occasion, but Mr. Choate is not here now.

Mr. Parsons: He says: "If the witness claims some privilege and declines to answer, application may be made to punish him for contempt; upon which application he may be heard in support of his alleged privilege."

The Witness: I have answered those questions which he has directed me to answer.

Mr. Sherman: That is a part of the decision, and the rest of it is, "upon which application he may be heard in support of his alleged privilege. If his contention be an arguable one, even though it does not convince this court

opportunity to review may be given as in the case of Mr. Butler's claim of privilege which was heretofore raised in this suit."

The Witness: I have answered the questions specifically in that decision according to his directions. The only answer I gave to you in regard to Mr. Vaughan was simply a recognition of the same principle laid down there——

155 Q. Oh, do not make an argument on the record, Mr. Myrick. If you do not want to answer say you do not want to answer, and then I shall know just what to
147 do next. I will state for your comfort that I am very near an end, in case that has any value.

A. No haste on my account.

Mr. Parsons: What is the question asked now?

(Question No. 153 repeated by the stenographer as follows): "And were there securities disposed of within that week to the amount of $175,000 by Mr. Vaughan and yourself belonging to Mr. Fayerweather?"

The Witness: I decline to answer regarding any act of Mr. Fayerweather's in his lifetime.

156 Q. Well, will you answer this question? This
148 does not relate to Mr. Fayerweather, this relates to you and Mr. Vaughan. Did you hear the question read?

A. Yes, I heard the question read?

157 Q. Well, there is nothing about Mr. Fayerweather there?

A. What is that?

Mr. Sherman: Read it again, please.

(Question No. 153 again repeated by the stenographer)

The Witness: I decline to answer because it is not connected with the will or any other paper which you wish to make public.

158 Q. The question is repeated. Will you answer that question?

A. I decline to answer it on the same ground.

Q. On what ground?

A. On the ground that the calling on me to describe my act at the direction of Mr. Fayerweather is irrelevant.

160 Q. Do you claim the right as a witness to take an objection to the relevancy of testimony and thereupon assert a privilege not to answer it because you think

149 it irrelevant to the issue.

A. Not other then I did at the last examination.

Mr. Sherman: Repeat the question.

(Question No. 160 repeated by the stenographer.)

The Witness: I do believe that I have a right to object to that line of testimony, to that line of inquiry rather.

161 Q. Is that the best answer you can make to the last question?

A. I believe that is a direct answer.

150 162 Q. And that is as intelligent an answer as you can make, is it, to the last question?

A. That is as nearly the legal phrasing of it as I can give.

163 Q. Do you remember the letter addressed to Mr. Vaughan and yourself, written by Mr. Vaughan and signed by Mr. Fayerweather on the 15th day of November, 1890?

A. I remember having either heard the letter read or reading it in the testimony.

164 Q. Do you remember that it contained substantially, among other things, these words, in addition to the securities already disposed of by you, you are directed to give Mrs. Beardsley $100,000, or that in substance?

A. That is my remembrance of the letter.

165 Q. Under the authority or ratification contained in

that letter in the words, ("in addition to the securities already disposed of by you,") did you and Mr. Vaughan dispose of $175,000 in securities in the week preceding Mr. Fayerweather's dying day?

A. We did not.

166 Q. What were the securities disposed of by you referred to in that letter?

The Witness: I take the same position as I did with regard to the question that I declined to answer.

Mr. Sherman: I ask the examiner to certify the re-
151 fusal of the witness to answer to the court.

(The Examiner so certifies.)

Mr. Parsons: Does that terminate your examination?

Mr. Sherman: Yes, until the certificate is disposed of. I state to the witness that I will bring the certificate to the attention of the court on the next motion day, Friday next.

Mr. Parsons: I want to ask you something.

By Mr. Parsons.

167 XQ. Mr. Myrick—

Mr. Sherman: I object to any cro. examination
152 of this witness until his examination in chief shall be concluded.

Mr. Parsons: If the counsel has any other examination of Mr. Myrick at this time counsel for the defense will wait until it terminates, otherwise they will examine the witness, and the first question I put to Mr. Myrick is——

168 XQ. Was whatever was done by you in the few days preceding Mr. Fayerweather's death done by his direction?

Mr. Sherman: One minute. I object to your breaking in. Objected to on the ground that the examination in chief of this witness is not concluded, but is

necessarilly suspended because of the contunacious disregard of the ruling of the circuit judge, and I shall move to strike out anything purporting to be cross examination which the counsel for the defendants, because of the mere physical situation of this examination, sees fit to force upon the record.

Mr. Parsons: We propose to examine him about his claim of privilege, and request the Examiner to repeat the question.

Mr. Sherman: I object to that on the ground that
153 the claim of privilege is a claim of the witness, that the counsel for the defendants are not counsel for the witness and cannot interpose in that behalf.

(Question No. 168 repeated by the stenographer)

Mr. Parsons: Answer.

A. It was.

169 XQ. And do you regard it as confidential and for that reason privileged?

A. That is my only reason for it; no other reason whatever.

170 XQ. Did this confidence come from the relation which existed between you and Mr. Fayerweather or from something that was said by him to you?

154 A. It was the result of the confidence—I concluded that it was the result of the confidence which came by reason of my association.

171 XQ. How long had that association continued?

A. Seventeen years; the last three of it I was in charge of his private affairs.

172 XQ. To what extent during that period did you possess his confidence?

A. During the entire time.

173 XQ. To what extent did you possess his confidence, his entire confidence, did you have his entire confidence.

A. That would be hard work to determine.

Mr. Sherman: Objected to on the ground that it is wholly immaterial whether Mr. Myrick possessed one hundred per cent. of Mr. Fayerweather's confidence or ninety per cent. or one-eighth of one per cent.

174 XQ. Did you consider what passed between you and Mr. Fayerweather as confidential?

A. I did. I have tried to retain it so until I am forced into court.

155 Adjourned to January 11th, 1901, at 11 A. M.

156

FAYERWEATHER
vs.
RITCH,

157 REYNOLDS
vs.
RITCH.

NEW YORK, January 11th, 1901.

158 Met pursuant to adjournment. Present: The Examiner, Mr. Sherman, Mr. Blaikie, Mr. Parsons, Mr. Bovee, Mr. Carnochan, Mr. McLoughlin, a representative of Mr. Kiddle, a representative of Root, Howard, Winthrop and Stimson, and a representative of Nash & Jones.

Adjourned to January 15th, 1901, at 11 A. M.

FAYERWEATHER
vs.
RITCH,

159 REYNOLDS
vs.
RITCH.

NEW YORK, January 15th, 1901.

Met pursuant to adjournment. Present: The Examiner, Mr. Sherman, Mr. Blaikie, Mr. Stimson, a representative of Nash & Jones,
160 and a representative of Butler, Notman, Joline & Mynderse.

Continuation of the examination of *F. B. MYRICK.*

By Mr. Sherman:

175 Q. Mr. Myrick, I will repeat to you the 153rd question which the Court directs you to answer, which is as follows: "Q. And were these securities disposed of within that week to the amount of $175,000 by Mr. Vaughan and yourself belonging to Mr. Fayerweather?"

Mr. Bovee: Counsel for the defendants object to the question and to the line of the examination upon the following grounds:

First, That it is irrelevant and immaterial to any issue presented by the special plea, and as to similar questions Judge Lacombe has stated it to be his opinion that they are irrelevant, and that under the circumstances to pursue the inquiry is disrespectful to the Court and wholly indefensible and unjustifiable;

Second, The defendants' counsel reiterate the stipulation which they have heretofore tendered to remove
161 all irrelevant matter from the record, and they protest and object against being put to the necessity of introducing irrelevant testimony or of leaving unanswered statements which are untrue and absolutely denied.

Mr. Sherman: Counsel for the complainants protests against the last objection on the ground that under guise of taking objection the counsel for defendants instructs a witness hostile to the complainants and under the control of the defendants what answer he shall make to the question. Now Mr. Myrick will you answer?

A. Under protest, but in accordance with the ruling of Judge Lacombe, I will answer the question. There
162 passed out of Mr. Fayerweather's possession in the last week of his life $175,155, no more no less. That is your question with the addition of $155.

176 Q. Do you intend that to be an answer to question No. 153 just repeated and to all of it?

A. Yes, sir. You asked if that amount passed out of his possession.

177 Q. No, I did not. The question is repeated.

(Question No. 153 repeated by the stenographer.)

A. Yes, sir, with that amended amount, which is $155, more than you asked.

178 Q. And did you take those securities out of his box in the Nassau Deposit Vault?

A. Yes, sir.

Mr. Bovee: One moment, same objection as before.

179 Q. Did you have any other authority for so doing besides the letter purporting to be dated November 15th, 1890, addressed to you and to Mr. Vaughan, the substance of which had been previously read to you in your examination?

Mr. Bovee: The same objection and offer.

The Witness: The same protest.

A. I did not act under that letter, I acted as testified to here at the last examination under the direct direction of Mr. Fayerweather. The letter was unknown
163 to me at the time that it was written.

180 Q. State when and where Mr. Fayerweather gave you each such directions as he did give you.

Mr. Bovee: Same objection and offer.

The Witness: Same protest on my part.

A. Monday morning.

181 Q. November 10th, 1890?

A. November 10th.

182 Q. 1890?

A. In the front sitting room of his house.

183 Q. Was that the first occasion?

A. That was the first occasion.

164 184 Q. And the only occasion?

A. No, sir, the second one was on Wednesday morning in the rear room, or bed room you might call it.

185 Q. The room in which he died?

A. The room in which I suppose he died, where he was sick.

Mr. Bovee: The same objection to all these questions and the same offer?

186 Q. Were those the only two occasions when he gave you any such directions?

Mr. Bovee: The same objection.

184 A. In regard to these payments, yes, sir.

188 Q. And how long did the first interview last when you were in Mr. Fayerweather's presence in the front room?

Mr. Bovee: Same objection.

A. Which interview do you refer to.

188 Q. The first one, on Monday.

A. There were two interviews on Monday.

189 Q. You have not stated that. The first one on Monday was when?

Mr. Bovee: Same objection.

A. As I answered you. It seems to me you went over that subject. I was there alone.

190 Q. Let us begin with the hour, if you please, 165 and that will avoid confusion.

Mr. Bovee: Same objection.

A. Well, say between 9.30 and 10 I would say.

191 Q. On that Monday morning the 10th.

A. Yes, sir.

192 Q. And how long did that interview last?

A. Well, allow me to put in—or give you some information.

193 Q. No, I do not want any information, I want an answer

Mr. Bovee: Answer the question, Mr. Myrick.

The Witness: He does not specifically state the particular interview. There were two interviews.

166 194 Q. I am talking about the first interview, the one which you specified as the first. You say there were two on Monday; now I ask you first as to the first as to which you testified, beginning as you say at 9.30. How long did that interview last?

Mr. Bovee: The same objection.

A. Twenty minutes I should think.

195 Q. Was any one else present?

Mr. Bovee: The same objection.

A. Not at the first interview.

196 Q. When did the second interview on that Monday begin?

Mr. Bovee: The same objection.

A. About five minutes thereafter.

197 Q. Do you mean to say there was a break in the

continuity of the interviews of Monday of about five minutes.

Mr. Bovee: The same objection.

A. As near as I can determine the time.

198 Q. And then the interview continued quickly?

Mr. Bovee: Same objection.

A. Yes, sir.

199 Q. What was the occasion of your being out of
167 Mr. Fayerweather's presence for that five minutes? Did some one else come in?

Mr. Bovee: The same objection.

A. I simply went to call Mr. Vaughan.

200 Q. Where was Mr. Vaughan?

A. I suppose he was in the front parlor.

201 Q. Well, did you call him?

A. I did.

202 Q. And he responded, did he?

A. Yes, sir.

203 Q. And came right up?

168 A. Yes, sir, and came right up.

204 And the latter part of that interview went on in his presence, did it?

A. Yes, sir.

205 Q. About how long did that last?

A. Well, that could not have been over—I could only guess at it—I should say half an hour.

206 Q. And that comprises the whole of the first day's interview?

A. Yes, sir, that comprises the whole of it.

207 Q. I wish you would say exactly what was said at the first interview when you were alone with Mr. Fayerweather. Kindly begin at the beginning and state what you said to him and what he said to you as near as you can remember.

Mr. Bovee: We object to this question on the ground that it is incompetent, irrelevant and immaterial to any issue presented by the special plea, and that as to similar

questions Judge Lacombe has stated it to be his opinion that they are irrelevant and that under the circumstances to pursue the inquiry is disrespectful to the court and wholly indefensible and unjustifiable. Defendants' counsel reiterate the stipulation which they have heretofore tendered to remove all irrelevant matter from the record and protest and object against being put to the necessity of introducing irrelevant testimony.

169 Mr. Sherman: Counsel for the complainants accepts the admission of counsel for defendants that they have put upon the record irrelevant matter, but declines further to recognize the propriety of their proposed stipulation. Now Mr. Myrick if you will hear the question read, the interruption may make it desirable.

(Question No. 207 repeated by stenographer.)

A. I saluted him when entering, and the first question, as I remember it, that he put to me was with regard to the payment of the collateral inheritance tax upon legacies. He asked me what it was and I told him

170 to the best of my knowledge.

208 Q. Well, what did you tell him?

A. I told him that I understood it was five per cent.

209 Q. Is that all you told him?

A. As far as I can remember, yes, sir.

210 Q. That did not exhaust the interview, did it?

A. Oh, no, only on that question.

211 Q. Well, will you proceed?

A. He spoke then—his answer was, Well, that would not be much; and I cannot tell exactly whether it was at that interview or Wednesday where the subject came up with regard to paying the amounts that were to be given his nieces, that is Mrs. Fayerweather and Mrs. Achter, outside of the will. He had intended to make a will soon. As I say, I can only tie the two interviews together.

212 Well, do the best you can; you need not make protests; we will take it as you put it.

A. The point that was in discussion was whether he would not make all the payments that he intended to make to his relatives from his securities and then have the will free and clear——

213 Q. Leave them out?

A. As if they were not mentioned.

171 214 Q. Was Mr. Vaughan present when that occurred?

A. No, sir, he was not, not at the first interview, and I do not remember that the question came up when Mr. Vaughan was there.

215 Q. Well, wont you proceed if you please and state all that occurred at the first interview, so far as you can place it as occurring at that interview?

Mr. Bovee: Same objection.

216 Q. I mean the first half of the first interview when you were there alone with Mr. Fayerweather.

A. Then the question came up and Mr. Fayerweather said, "Now, Mr. Myrick, have you any objections to

172 Mr. Vaughan checking over the securities in that box?" I said, "Not the slightest, I often thought or hoped that you would do it yourself because there was nobody to traverse my work." "Well," he says, "I know you, Myrick, I know you, Well," he says, "Then Mr. Vaughan can go down there with you and check them over." Then I talked with him with regard to the placing of a loan, as I remember it now it was $250,000, on the Masonic Temple in Chicago. Mr. C. F. Gray was there and in charge of that end of the business and I think I had received a letter that same morning at the same time I received the letter from Mrs. Reynolds to come to the house. We discussed the question, and Mr. Fayerweather decided that he would make the loan.

217 Q. Do you mean when you say Mrs. Reynolds the lady who is now Mrs. Reynolds but who was Miss Joyce?

A. Yes, Miss Amelia Joyce, she was then. She wrote me a letter that Mr. Fayerweather wanted to see me.

218 Q. Miss Anner Amelia Joyce, she was then?

A. Yes, sir.

219 Q. You left the loan in the air? Was anything arranged or any conclusion reached?

A. There was a conclusion reached that it should be
173 made.

220 Q. Did you have some papers before you on the subject, some correspondence?

A. I think that I had a letter——

Mr. Bovee: Same objection.

The Witness: I think that I had a letter from Gray, that is my remembrance now.

221 Q. Had Gray represented him in Chicago previously?

222 Q. And that letter gave some information about the loan and the desirability of it?

A. That is my recollection of it, yes, sir.

174 223 Q. And he decided that it should be made?

A. Yes, sir, he decided that it should be made.

224 Q. Was it made?

A. It was not. I telegraphed Mr. Gray Monday morning that he was dead and therefore it would have to go off.

225 Q. Well, go on.

A. I cannot remember anything that occurred thereafter, and I immediately left the room and went down and called Mr. Vaughan.

226 Q. Did Mr. Fayerweather request you to do so?

Mr. Bovee: Same objection to this question.

A. I do not remember whether he did or not.

227 Q. Well, then, you two returned, did you?

A. Well, I did it because I was advised by Mrs. Reynolds—Miss Joyce then—that Mr. Fayerweather wanted first to see me alone and then thereafter in the presence of Mr. Vaughan.

228 Q. Have you that letter?

Mr. Bovee: Same objection.

A. I think it must be among his papers. I have never looked it up.

229 Q. Will you search for it and produce it if it can be found at the next session?

A. No, sir, I cannot; I am a clerk of the executors.

230 Q. Have you any other objections to producing
175 it?

A. I know of none.

231 Q. The letter was addressed to you, was it not?

A. That I cannot answer.

232 Q. You cannot answer? I thought you just said it was.

A. I said a letter came from Mr. Gray, as I remembered it.

233 Q. I am talking now about the letter from Miss Joyce to you.

A. Oh, no, that was torn up then, I never kept any letters.

176 234 Q. Well, both Mr. Vaughan and yourself returned then to Mr. Fayerweather in the front room on the second story?

Mr. Bovee: Same objection.

A. Yes, sir.

335 Q. And I wish you would state all that transpired on that second half of the first day's interview.

Mr. Bovee: Same objection.

A. I cannot answer or define it in detail; I can give you all the subject that came up.

236 Q. Well, do the best you can about it.

A. As I remember it, first he spoke of Mr. Vaughan going with me to the safety deposit vault to check over securities——

237 Q. Let me ask you there whether you had furnished him any list of them.

Mr. Bovee: Same objection.

A. At the time?

238 Q. Yes, that day?

A. No, not that day.

239 Q. Did he have with him a list of them?

A. No, I went there every Friday night and advised him what I had done during the week, and if he was out of town I wrote him.

240 Q. No, but here are some securities in the vault and he wants Mr. Vaughan to check them; that might imply that there was some list to be verified.

177 Q. Was there a list?

A. Yes, sir, on a book.

241 Q. Where is that book now?

A. The book is in the possession of the executors.

242 Q. And what description of book is it?

A. Well, it had better be called the red book.

243 Q. That is the usual way of describing it.

A. Yes, sir, I would know what you meant if you said the red book of Mr. Fayerweather.

Q. And that contains a complete and full list of the 244 securities belonging to Mr. Fayerweather at the time, does it?

A. Not that book alone; there is another one; I 178 filled one book and again another one which I call the drab book.

245 Q. And they are now in your possession as clerk of the executors?

A. Yes, sir.

246 Q. Well, do those two books together contain a full and accurate and true statement of all the securities owned by Mr. Fayerweather at that time?

Mr. Bovee: The same objection, and also on the ground that the book is the best evidence of what the book contains.

Mr. Sherman: I call on the counsel for the executors, the defendants, to produce these two books.

Mr. Bovee: You may call, Mr. Sherman.

Mr. Sherman: I do call.

Mr. Bovee: I have no objection to your calling whenever you please.

Mr. Sherman: I not only may call but I do call. Do you produce it then?

Mr. Bovee: Certainly I do not.

Mr. Sherman: Now Mr. Myrick, the foundation having been laid for secondary evidence, go ahead.

179 (Question No. 246 repeated by stenographer.)

Mr. Bovee: We object to it as incompetent, irrelevant and immaterial and not in any way within any issue presented by the plea; also upon the same grounds that I have stated before to the other questions and make the same offer that was made before.

A. I think there was a memorandum on a bill book of a note of $42, $42 or $72, and there was another entry on a book in which I kept a record of notes which I bought for him, which also contained a memorandum of a loan of I think $10,000, that was made to Hall &
180 Vaughan the prior week. Substantially those two books contain every memorandum of his assets, that is you may say his personal assets.

247 Q. And what was the aggregate value at that time of those securities?

Mr. Bovee: The same objection.

A. That is not in my mind.

248 Q. Well, as nearly as you remember, I mean of of course the face or par value, I am not asking you now the market value.

A. That I could not answer, it would be only guesswork.

250 Q. You kept those books yourself?

A. Yes, sir.

251 Q. You are an experienced accountant?

A. I can earn my own living at it and I have.

252 Q. And you had previously for some years, had you not?

A. Yes, sir.

253 Q. And Mr. Vaughan and Mr. Fayerweather relied on you and your books to keep him informed as to the condition of his assets, didn't he?

Mr. Bovee: The same objection.

A. I did keep him informed and the books were there, but I did not keep in mind the exact number of dollars that existed at one moment or another. No

181 accountant can.

254 Q. Nobody has asked you to do that, Mr. Myrick. If you will give within half a million of it I shall be satisfied.

Mr. Bovee: The same objection.

A. Well, if you will allow my guess——

255 Q. I want your best recollection.

A. I have no recollection, it must be a guess.

256 Q. Have you no recollection whether it was one million or five millions?

A. Yes, sir, I certainly know it was not five millions.

257 Q. Do you know whether it was over one mil-

182 lion?

Mr. Bovee: The same objection.

A. By process of reasoning, yes.

258 Q. Do you know that it was above two millions?

Mr. Bovee: The same objection, and upon the further ground that the witness has stated that it is impossible for him to say, and that any evidence that he would give would be a pure matter of speculation, and we are not here to take speculations.

A. If I had the inventory before me I could give you the exact figures.

256 Q. Mr. Fayerweather bought no more securities to any serious amount between the 10th of November when this interview occurred and the 15th when he died, did he?

Mr. Bovee: The same objection.

A. None at all.

260 Q. None at all?

A. None at all.

261 Q. You assisted the executors in making up the inventory for the Surrogates' Court, didn't you?

A. Yes, sir.

262 Q. And they relied generally upon your labors in that connection, didn't they?

Mr. Bovee: Same objection.

183 A. They were present when the securities were checked.

263 Q. And you got them together to be checked, you did the preliminary work, didn't you?

A. I did not; they were in the box and I had no right to go there after Mr. Fayerweather's death.

264 Q. Well, does the inventory filed by the executors in the Surrogates' Court truly represent the securities in that box?

Mr. Bovee: Same objection.

A. As the securities are stated, every penny.

265 Q. Do you really need to see the *inventory* to
184 say whether the personal estate was more or less than one million dollars.

Mr. Bovee: Same objection.

A. I can give you a guess that it was over a million dollars; I can only, as I told you, by process of reasoning arrive at the result.

266 Q. Don't you know that the *inventory* made up with your assistance and participation by the executors and *filed in the Surrogates' Courts* shows his personal estate at that time to be upwards of four millions of dollars?

Mr. Bovee: Same objection.

A. I do remember it.

267 Q. That is a fact, is it not?

Mr. Bovee: Same objection.

A. Three million nine hundred and ninety-eight thousand dollars I think it is.

268 Q. Was there among the assets an item derived from the purchase by the surviving members of the firm of Fayerweather & Ladew of Mr. Fayerweather's interest in the firm which was inventoried at $1,600,000?

Mr. Bovee: The same objection and also that the inventory is the best evidence and will speak for itself as to what was its contents?

185 A. My remembrance of it is that that item was included but I think you are a million dollars out of the way.

269 Q. You say I am a million dollars out of the way?

A. Yes, sir, I think so.

270 Q. Let me call your attention to the fact that I am now talking about the proposition that that interest was inventoried at $1,600,000, and it turned out to be worth $800,000 more.

Mr. Bovee: The same objection to this question.

A. I do not remember what was the appraised value.

186 271 Q. In point of fact, as it transpired, that item turned out to be two million six hundred thousand dollars, didn't it?

A. That is my remembrance.

Mr. Bovee: Same objection to this question.

272 Were you acquainted with Mr. Fayerweather's holdings in realty, in real estate?

A. Yes, sir.

Mr. Bovee: Same objection to this question.

273 Q. What proportion did the values of his realty bear to the values of his personal estate?

Mr. Bovee: We object to this as irrelevant to the issue presented by the special plea, immaterial and incompetent, and as calling for the opinion of the witness. Judge Lacombe has stated that all such matter is in his opinion irrelevant, that under the circumstances to pur-

sue the inquiry is disrespectful to the Court and indefensible and unjustifiable. Defendants' counsel reiterate the stipulation which they have heretofore tendered to remove all irrelevant matter from the record, and they protest and object against being put to the necessity of introducing irrelevant testimony or of leaving unanswered testimony called out by the counsel for the complainants.

A. I should say ten or fifteen per cent.

274 Q. Is it true that the executors ascertained and reported that the entire value of the estate was upwards
187 of six millions?

Mr. Bovee: Same objection.

A. I have no remembrance of such a statement at this moment, I do not know what you refer to.

275 Q. Well, what is the inventory?

Mr. Bovee: I object the same as before. The inventory will speak for itself as to what it contains.

Mr. Sherman: This is better authority than the inventory.

A. My remembrance is that the appraised value of the inventory was about four millions.

276 Q. Well, now, Mr. Myrick, you have been entrusted by the executors with all the details of handling
188 this money coming in and outgoing and you have drawn all the checks, have you not?

A. Yes, sir.

277 Q. And you are acquainted with the administration, perhaps, better than either of the three executors, is that so?

A. It is fresher in my mind probably.

278 Q. Well, your connection with the details was more intimate than theirs, is not that so?

A. You mean when?

279 Q. I mean the business administration of the estate in the hands of the executors.

Mr. Bovee: Same objection to this question.

A. Yes, sir.

280 Q. Now you keep the books of the estate, don't you, as bookkeeper?

A. Yes, sir.

281 Q. And you attempt in keeping those books to present a fair and honest showing of the administration of the estate, do you not?

Mr. Bovee: Same objection.

A. Yes, sir.

282 Q. And you believe that your books do contain such a record, do you not?

189 Mr. Bovee: Same objection.

A. In every item.

283 Q. Now, what has been realized in the administration of the estate from the calling in of the various assets, has it been more or less than the appraised value as ascertained by the appraisers in the Surrogates' Court?

Mr. Bovee: Same objection.

A. More.

284 Q. How much more?

Mr. Bovee: The same objection.

285 Q. Well, in round numbers it has been upwards of six millions, has it not?

Mr. Bovee: Same objection.

190 A. In excess?

286 Q. No, altogether.

A. Leaving out income, simply the increase of property? Do you mean the actual increase above the appraised value as filed in the Surrogates' Court?

287 Q. Of the corpus of the estate, yes.

A. No, sir.

288 Q. Has it been under six millions?

A. Decidedly.

289 Q. How much?

Mr. Bovee: Same objection.

A. My memory does not serve me with regard to that.

290 Q. Well, as nearly as you can recall.

A. Well, I am trying to recall how much excess or increase we took up on the first accounting. I cannot answer the question; it is stated in the various accounts as filed correctly.

291 Q. Well, let us put it this way. Adding to the corpus of the estate as it was when Mr. Fayerweather died the accretions by income or by the increase in values, has not the estate brought in hand to the executors upwards of six millions of dollars?

Mr. Bovee: The same objection, and also upon the
191 ground that the accounts filed by the executors are the best evidence.

A. I think it is close to six millions?

292 Q. Well, above or below? Have you any doubt that it is above six millions, put in that way?

Mr. Bovee? Same objection.

A. I think it is less, a trifle less; it is close to six millions.

293 Q. Well, how much of a trifle less?

A. I cannot tell you, it may be a a dollar above or a dollar below, or it may be a hundred thousand above or below, it is close to that amount, I have not the exact figures in my mind.

192 294 Q. What books in your possession as clerk of the executors will show the exact facts in that regard?

Mr. Bovee: The same objection.

A. I should say my ledger is the one from which all the accountings were made.

295 Q. Has there been only one ledger in that time?

A. Only one ledger so far.

296 Q. And you keep journals and day books and blotters?

A. I have a cash book, I keep a journal entry but it has been put in the back of the cash book for convenience and to save buying another book.

297 Q. Then you carry your ledger entries forward either from a journal or cash book?

A. Yes, sir.

298 Q. From no other books?

A. No, sir.

299 Q. And that simple form answers your purposes?

A. Yes, sir.

Mr. Sherman: I call on the counsel for the defendants, the executors, to produce the books thus described by the witness. Do you stand mute or pro-

193 duce them?

Mr. Bovee: I do not produce the books called for by the counsel.

Mr. Sherman: Will the counsel for the defendants state any future time when they will produce the books so that they may be used in connection with the examination of this witness?

Mr. Bovee: Counsel for the defendants will state nothing of the kind.

300 Q. Had you any knowledge, Mr. Myrick, of the fact that Mr. Fayerweather on the 11th day of November, 1890, signed a paper purporting to be a codicil to his last will, which paper was prepared or drawn by

194 Prescott Hall Butler?

Mr. Bovee: Counsel for the defendants object to this question on the ground that it is irrelevant and immaterial to the issue presented by the special plea. As to similar questions Judge Lacombe has stated it to be his opinion that they are irrelevant. Second, defendants' counsel reiterates the stipulation which they have heretofore tendered to remove all irrelevant matter from the record, and they protest and object against having the testimony spread upon the record.

A. Not other than I learned by listening to the testimony in the trial before the Surrogate.

Mr. Bovee: He asks of your own knowledge, Mr. Myrick.

Mr. Sherman: Do not instruct the witness.

Mr. Bovee: I do not.

Mr. Sherman: Well, do not communicate with him while he is under examination.

301 Q. Is that the first you ever heard of any?

A. Yes, sir.

302 Q. Mr. Vaughan never showed you the paper while he had it?

A. No, sir.

303 Q. Never stated to you anything about it?

195 Mr. Bovee: Same objection.

A. I have no remembrance of that; I know that there was a talk with him about——

Mr. Bovee: Did he ever state to you?

Mr. Sherman: I do not propose to have you interfere at this delicate point.

Mr. Bovee: I propose to call the attention of the witness to the question.

Mr. Sherman: No, you wont instruct your witness at all.

Mr. Bovee: I will not instruct the witness, but I
196 understand my duties, Mr. Sherman, quite as well as you do.

Mr. Sherman: No you don't; you commenced later and you began badly.

Mr. Bovee; We will see whether I do or not.

(Question 303 repeated by stenographer.)

Mr. Bovee: We object to that as incompetent, irrelevant and immaterial to any issue presented by the special plea, and also upon the further ground that the witness has said that he had no knowledge of the paper, and whatever was said to him is hearsay and incompetent. He has no knowledge of the paper itself. Counsel for the defendants make the same tender that has been stated before in respect to irrelevant matter.

Mr. Sherman: Now proceed Mr. Myrick.
The Witness: Please read the question.

(Question No. 303 and the answer thereto as far as given repeated by stenographer.)

The Witness: The only talk that I know about it was the talk with regard to testimony that came out at the Surrogates' Court, and my remembrance of it is, too,
197 that it was after that trial; I do not think he ever said a word to me prior to that, I think was my first knowledge of that.

304 Q. What securities were disposed of by Mr. Vaughan and yourself, whether pursuant to the letter of November 15th, 1890, or otherwise, during the last week of Mr. Fayerweather's death, and to whom were they disposed of?

Mr. Bovee: The same objection.

A. There were $125,155 disposed of to Ex-Probate Judge Morris B. Beardsley of Bridgeport, Connecticut, $25,000 each to Mr. Vaughan and myself; and none under the letter of November 15th.

198 305 Q. What did you personally have to do with making disposition of those securities?

Mr. Bovee: Same objection.

A. I notified Judge Beardsley with regard to the present; I think I carried some of the securities to the railroad companies of which they were their issue and had them transferred to Mr. Beardsley.

306 Q. Does that cover it all?

A. I think it does. I think all the other disposition was made in what was called coupon securities; that is my remembrance now.

307 Q. Well, have you now named all the persons to whom these securities were distributed?

Mr. Bovee: Same objection.

A. Yes, sir.

308 Q. Now will you state all that Mr. Fayerweather said in your hearing concerning the disposition of those securities to Mr. Beardsley, and when and where he said what he said?

Mr. Bovee: Same objection.

A. The first statement was made at the second interview with Mr. Fayerweather on the Monday morning, November 10th, 1890, in the presence of Mr. Vaughan.

199 He told us that as he had not given Morris anything: that we should give him $50,000 and also $75,000 more with which he was to establish a trust fund for his three children.

309 Q. Does that cover it?

A. I think that is a true answer to your question.

310 Q. When did you deliver such securities to Mr. Beardsley?

Mr. Bovee: Same objection.

A. I delivered them on Friday morning close to noon time, November 14th, 1890.

311 Q. Where?

A. At the safety deposit vault.

200 312 Q. Did Mr. Beardsley attend there with you?

A. He did.

313 Q. What did Mr. Fayerweather say in your hearing with respect to the $25,000 to yourself and the $25,000 to Mr. Vaughan?

Mr. Bovee: Same objection.

A. He told me that he gave me $25,000, made me a present of $25,000 "and the same to you Mr. Vaughan"—whether it was in that order or not, whether he spoke to Mr. Vaughan or myself first I cannot remember.

314 Q. Is that all he said?

A. Yes, sir.

315 Q. You are sure that your memory serves you when you say that?

A. I am sure my memory serves me exactly.

316 Q. And when were the two sums of $25,000 each, or

the securities therefor, taken from the box and delivered to yourself and Mr. Vaughan respectively?

Mr. Bovee: Same objection.

A. My remembrance is that it was on the same afternoon, I think a Friday afternoon.

317 Q. The afternoon of the day on the morning of which you gave the securities to Mr. Beardsley?

A. Yes, sir, the 14th of November, 1890.

201 318 Q. Well, who determined what particular securities should be applied to Mr. Beardsley and to yourself and to Mr. Vaughan?

Mr. Bovee: Same objection.

A. Mr. Vaughan and myself.

319 Q. Mr. Fayerweather had left that entirely to you, had he?

A. Yes, sir.

320 Q. Mr. Fayerweather had indicated no particular securities?

A. No, sir.

321 Q. They were simply to be taken from the body of his estate, is that right?

202 A. Yes, sir.

322 Q. And they were taken pursuant to the joint judgment of Mr. Vaughan and yourself?

A. Yes, sir.

322 Q. So far as you know do the securities to the amount of $175,155—have I it right?

A. Yes, sir, that is right, that is the exact amount.

324 Q. —comprise all of the property of Mr. Fayerweather which was disposed of in his life time?

Mr. Bovee: The same objection.

325 Q. I mean during the last week of his life time.

A. Yes, sir, so far as I know.

326 Q. Was there any delivery to Mrs. Beardsley, Judge Beardsley's wife, of any sum during Mr. Fayerweather's life time?

Mr. Bovee: Same objection.

A. Not a dollar.

327 Q. Are you aware that Mr. Fayerweather made a direction that she should receive $100,000?

Mr. Bovee: Same objection.

A. Only by reason of that letter.

328 Q. You have no other information about it than that?

A. No, sir.

329 Q. Why did you not deliver that $100,000 in conformity with that letter?

203 Mr. Bovee: Same objection.

A. I certainly could not, it was a physical impossibility.

330 Q. It was there was it not?

A. Yes, sir.

321 Q. What do you mean by saying it was a physical impossibility?

A. Because the letter was written on November 15th, 1890, in the presence of Mr. Fayerweather by Mr. Vaughan; I believe that is admitted; the last time that I saw Mr. Vaughan on that date was about half past eight in the morning; I did not see Mr. Vaughan when I went to the house in the evening of that date, and as

204 that letter was written in the interim, and as Mr. Fayerweather died between the hour when I saw Mr. Vaughan on Saturday and the hour that I saw him on Sunday, it was impossible for me to act.

332 Q. You mean that you could not act in his life time, do you not?

A. I could not act in his life time.

333 Q. And you considered that your authority under that letter ceased at his death, is that what you mean?

A. Yes, sir.

334 Q. And what was the view Mr. Vaughan took of it?

Mr. Bovee: Same objection.

A. Yes, sir.

335 Q. Did he say so?

A. He did not; he did not act, I know that; I can only judge, I can only draw conclusions.

336 Q. Well, were the hundred thousand dollars conforming to that letter ever paid to Mrs. Beardsley?

A. Yes, sir.

337 Q. When?

Mr. Bovee: Same objection.

A. Under the deed of gift about June or July of 1891, as shown in the accounting of March 1st, 1892.

338 Q. And in the meantime there was a contest
205 over the will and codicils, was there not?

A. Yes, sir.

339 Q. The deed of gift was executed on the 24th of February, 1891, was it not?

Mr. Bovee: I object to that; the deed of gift will speak for itself and is the best evidence.

A. I believe so.

Mr. Sherman: I call on the counsel for the defendants to produce the deed of gift.

Mr. Bovee: Counsel for the defendants does not produce the deed of gift.

Mr. Sherman: Now Mr. Myrick.

206 The Witness: I believe that was it.

340 Q. So that the amount designated by the deed of gift to be paid to Mrs. Beardsley was not paid until after all the releases were signed and delivered, was it?

Mr. Bovee: Same objection as before.

A. After that date.

341 Q. Paid after that date?

A. Yes, sir.

342 Q. After the releases were delivered?

A. Yes, sir, I believe so.

343 Q. You have the releases in your possession as clerk of the executors, have you not?

A. I have not the releases in my possession.

344 Q. Do you know where they are?

A. I know where——I think the release of Mrs.

Fayerweather — yes, it must be,— I think they are both in the safety deposit company.

345 XQ. To which Mr. Vaughan has the key?

A. Mr. Vaughan, Mr. Bulkley and Mr. Ritch.

346 Q. And are the powers of attorney there also, under which those releases were executed by Mr. Beardsley?

A. I think the powers of attorney by Miss Emma S. Fayerweather and Miss Mary W. Achter to Morris B. Beardsley are in my possession in the safe of the estate at room 125 Potter Building.

207 Mr. Sherman: I call upon the counsel for the defendant executors to produce the releases and the powers of attorney referred to by this witness.

Mr. Bovee: Counsel for the executors do not produce the papers.

347 Q. Mr. Myrick, do you remember the contents of the powers of attorney to Mr. Beardsley?

A. I do not; I do not know that I ever read them.

348 Q. You have no recollection whatever of their contents?

A. No, I have not.

349 A. Do you remember the contents of the releases?

Mr. Bovee: The same objection to this question.

208 A. I do not remember that I ever read them.

350 Q. Did you and Mr. Vaughan have a conversation to the effect that the gift in Mr. Fayerweather's life time to the wife of Morris B. Beardsley, not having been effected by any setting apart of securities or delivery of securities to her, was no longer of any legal efficacy?

Mr. Bovee: One moment. We object to the question as leading, irrelevant to the issue presented by the special plea, immaterial and incompetent.

A. I do not remember any conversation on that subject.

351 Q. Well that was your view of it, was it not?

A. My view was that Mr. Fayerweather was dead and I could not act any further.

352 Q. And was that your opinion also after you had become aware of the letter and its purport?

Mr. Bovee: We object to the opinion of the witness as incompetent, irrelevant and immaterial.

A. Yes, sir.

353 Q. Did you ever have any interview with Morris B. Beardsley in reference to the claim of his wife to have that $100,000?

A. No, sir.

354 Q. You never discussed it with him?

A. No, sir, never.

209 355 Q. It never was discussed by him with anybody in your presence?

A. No, sir.

356 Q. Did you have anything to do with drawing the deed of gift?

A. No, sir.

357 Q. Anything?

A. Nothing.

358 Q. Did you have any knowledge of it until after it was promulgated?

Mr. Bovee: The same objection to this question, that it is irrelevant and immaterial to any issue presented in this case.

210 A. I have no remembrance of it other than came out in the Surrogates' Court where mention was made of it, and Mr. Coudert made the remark that they promised so and so, and whether or not they produced the paper, that was my first knowledge of it.

359 Q. That was near the end of the trial in the Surrogates' Court?

A. Yes, sir, that was near the end of it; I do not think that I knew in any way of the deed of gift in any particular, I have no remembrance of it now I know.

360 Q. It was upon Mr. Coudert's challenge then produced in the Surrogates, trial was it not?

A. I think it shortly afterwards was, I do not know that it was that day.

361 Q. And that practically terminated the court proceedings in the Surrogates' Court, did it not?

A. Oh, no.

362 Q. What was done after that in the way of trial, do you remember?

Mr. Bovee: I object to this as incompetent, irrelevant and immaterial; the record in the Surrogates' Court
211 of that trial is the best evidence of what took place there; and as irrelevant and immaterial to the issues raised by the special plea.

Mr. Sherman: This gentleman knows what happened pretty well, I guess.

A. My remembrance of it is that either that day or the next trial day Judge Ransom decided that a *prima facie* case had been made with regard to the will which he would admit to probate, but reserved to the lawyers the opportunity to examine Mr. Vaughan further.

363 Q. You were present during all the trial days of the contest over the will and codicils, were you not?

A. The greater portion of them, yes, sir.

212 364 Q. Were you in the Surrogates' Court on the day when the argument occurred as to whether Mr. Prescott Hall Butler should be required to testify as to the contents of the codicil executed on November 11th, 1890?

A. I think I was.

365 Q. You heard the arguments and the decision?

A. I did.

366 Q. Did Mr. Joseph H. Choate argue in support of Mr. Butler's assertion, in substance, that by virtue of some privilege between Mr. Fayerweather and him, Mr. Butler, Mr. Butler need not and could not properly testify as to the contents of that codicil?

Mr. Bovee: One moment. Counsel for the defendants object that it is irrelevant to the issue presented by the

special plea, that as to similar questions Judge Lacombe has stated it to be his opinion that they are irrelevant, and that under the circumstances to pursue the inquiry is disrespectful to the Court and wholly indefensible and and unjustifiable.

Second, that so far as the question makes assumptions, they are wholly unproved, and that as defendants' counsel maintain they are incapable of proof. The manifest purpose is, under pretence of questions, to put unfounded and abusive matter upon the record, and this is wholly
213 indefensible and unjustifiable. Defendants' counsel reiterate the stipulation which they have heretofore tendered to remove all irrelevant matter from the record, and they protest and object against being put to the necessity of being compelled to introduce irrelevant testimony or of leaving unanswered statements which are unproved and which are absolutely denied. Also that the record of the proceedings in the Surrogates' Court is the best evidence of what transpired there.

A. My remembrance is that I was present only at the time when Mr. Butler refused to answer. I do not remember ever hearing any argument on the part of Mr. Choate on that subject.

214 367 Q. Did Mr. Butler after the ruling that he be required to answer ask the Surrogate for time to consult Mr. Choate outside?

Mr. Bovee: Same objection.

A. He asked for time to consult "his firm," I think he worded it.

368 Q. That is right. And was that time granted?

Mr. Bovee: Same objection.

A. I believe so.

369 Q. You heard the Surrogate rule that the privilege was not applicable and that he must answer, did you not?

Mr. Bovee: Same objection.

A. That is my remembrance.

370 Q. And in the interval between that session and the

next were proposals made to the widow of Mr. Fayerweather and to Mrs. Achter and Miss Fayerweather, Miss Emma S. Fayerweather, through Morris B. Beardsley, looking to the settlement which was made?

A. I do not know.

371 Q. When did you first learn that a settlement was under discussion or carried out?

Mr. Bovee: We object to that as irrelevant and immaterial to any issue presented by the special plea here.

What this witness learned is irrelevant and imma-
215 terial. And we make the same tender with respect to irrelevant matter.

A. I cannot give you the date.

372 Q. Well, approximately, as near as you can.

Mr. Bovee: Same objection.

A. Oh, some time in March.

373 Q. Was the agreement made preliminarily to the releases ever in your possession or custody?

Mr. Bovee: Same objection.

A. I think there were such documents; I think they were put in the safety deposit vault.

374 Q. By you?

A. Well, I may have physically carried them there.

216 No entrance can be made to the deposit vault unless Mr. Bulkley is present; one or the other of the executors must be with him because he carries the pass key. Whether I carried them there or Mr. Ritch or Mr. Bulkley or Mr. Vaughan, I do not know.

375 Q. Well, is it not true that Mr. Bulkley has not given much attention to the details of this matter but has left them to you mainly?

A. Mr. Bulkley is no figurehead.

376 Q. I did not intend to characterize him, I do not know why you should.

A. You say you paid no attention to it.

377 Paid no particular atttention to the details but left it to you.

The Witness: What is the question.

(Question No. 375 repeated by stenographer.)

The Witness: I cannot tell what attention Mr. Bulkley has given.

378 Q. Well, as far as you know?

A. Well, my opinion is that Mr. Bulkley has very quietly paid a great deal of attention to everything that has gone on.

217 379 Q. So quietly that the degree of his attention rests largely in surmise, is that so?

A. Do you refer to the releases or the transaction of that kind or the whole business.

380 Q. Oh, no, the whole business?

A. He leaves a great many details to me after having given me general authority.

381 Q. Well, how about this agreement to execute the releases, when did you first become aware of its existence and its tenor?

Mr. Bovee: We object to that as irrelevant and immaterial to any issue presented by the special plea, as to when Mr. Myrick did become aware.

218 A. I do not know, I can give you no other answer than I have lately given, that is, that I became aware of a settlement or was told that there had been a settlement some time in March.

382 Q. 1891?

A. 1891, yes, sir.

383 Q. Well, were you aware that one of the expressed terms of the agreement with Mrs. Fayerweather for the settlement was that there should be deeded to her by the executors the family plot in Woodlawn Cemetery where Mr. Fayerweather's remains were interred?

A. I was not aware of anything of the kind.

384 Q. You do not mean to say that the agreement contains nothing of the kind?

Mr. Bovee: We object to that as irrelevant and immaterial; the agreement is the best evidence of what it contains.

Mr. Sherman: The question is withdrawn.

385 Q. Do you know that the executors executed a deed of the plot and tomb to Mrs. Beardsley?

A. I do not know it.

386 Q. You do not know it?

Mr. Bovee: That is objected to as irrelevant and immaterial to any issue presented by the special plea,
219 and also if any such paper was executed the paper itself is the best evidence.

A. No, sir, and I also know they cannot.

387 Q. Don't you know that the executors through their counsel proposed, and had settled as part of the decree in the five college action which they set up here in bar of this suit, a provision authorizing the executors to execute a deed of a lot and tomb in Woodlawn to Mrs. Beardsley?

Mr. Bovee: We object to that as irrelevant and immaterial; the decree settled in the five college action is the best evidence of what that decree contains, and therefore incompetent.

A. I know there was something of that kind on that
220 decree; the exact phraseology of it I do not remember.

388 Q. Well, has any deed been executed accordingly?

A. No, sir. The law of the State of New York does not permit it.

Mr. Sherman: It is pretty hard to say what the law of the State of New York permits since the judgment in the five college action.

389 Q. Well, you have heard the executors say that notwithstanding that provision in the decree obtained by them they do not intend to execute any such deed because the law of the State of New York does not permit it?

Mr. Bovee: Same objection. What the executors may have said is outside of the issue in this case and irrelevant

and immaterial. And it has not been proven that they obtained the settlement of any such decree.

A. I heard Mr. Bulkley say that not withstanding any promise that was made it was an act that could not legally be done; he had investigated the law with regard to the land in Woodlawn Cemetery after there had been one interment, and he had no power whatever to act, or if he had acted the deed was worthless, that is it.

390 Q. Did he tell you where he thought the title to that land would rest if he should make an ineffectual
221 attempt to convey it to the widow of Mr. Fayerweather?

Mr. Bovee: Same objection, irrelevant and immaterial to any issues raised by the special plea.

A. I do not remember that he specified that.

391 Q. Well, was that the reason why the executors did not perform their agreement with Mrs. Fayerweather and execute such a deed to her?

A. I can only guess at it; I know that is what I judged.

Mr. Bovee: We object to the opinion of the witness as incompetent, irrelevant and immaterial.

392 Q. That is the reason Mr. Bulkley gave for it,
222 was it?

A. That was the reason that——that was the statement that was made.

Mr. Bovee: Same objection.

The Witness: And I was unaware of any deed having been given, and I knew that he made that statement also that he could not legally make the deed and cited the particular law that was passed in regard to it, and said that even if we had made a deed it would have been worthless.

393 Q. He said notwithstanding any promise that was the opinion?

Mr. Bovee: Same objection.

A. It was impossible for them to do it.

394 Q. He said notwithstanding any promise, I understood you to say a little while ago, that notwithstanding any promise it was not lawful for him to do it, is that right?

A. I do not know that he phrased it that way.

395 Q. That is the way you phrased it. I do not want to be unfair to you, Mr. Myrick, I will have that read.

(The answer to Question No. 389 was repeated by stenographer.)

223

The Witness: I will let my answer stand.

396 Q. That he did put it that way?

A. That was the general tenor, that was the meaning.

Mr. Bovee: The same objection to this question.

397 Q. The occasion for this statement from him was the discussion of the propriety of giving Mrs. Fayerwenther a deed, was it, of the Woodlawn lot?

Mr. Bovee: The same objection.

A. Mrs. Fayerweather?

398 Q. Mrs. Fayerweather, Mrs. Lucy Fayerweather.

A. Mrs. Lucy Fayerweather has been dead three

224 years.

399 Q. Then this discussion occurred after her death?

A. Oh, it did not occur until after Mr. Reynolds raised the question as to the deeding of the property after June 16th, with the decree—no, June 16th, 1896, was the decree of Judge Pryor, it was after that date.

400 Q. Well, previously you had not said that. Now what was the occasion of that discussion with them in consideration of Mr. Reynold's demands in respect to the tomb?

Mr. Bovee: Same objection.

A. That is my impression.

401 Q. Were the executors together.

A. No, that was in Mr. Bulkley's office; the matter had been brought up to his attention and he quoted the law, in fact he had a little pamphlet.

402 Q. Do not get ahead of the story. Who were present?

A. Only Mr. Bulkley and myself.

403 Q. Well, he was considering what was the proper answer to Mr. Reynold's demand, is that it?

Mr. Bovee: I object to the question as incompetent calling for the conclusion of the witness and not what
225 transpired, and irrelevant and immaterial to the issues presented by the special plea.

A. It is my remembrance that it was, well, some time after the question had been raised, how long I do not know.

404 Q. This promise to which he referred in speaking of his saying notwithstanding any promise the law prevented, was that promise made incidental to the settlement with Mrs. Fayerweather that the deed should be made to her, and which Mr. Reynolds was then bringing up.

A. I never knew that any promise was made to deed it to Mrs. Fayerweather.

405 Q. Well, to what promise did Mr. Bulkley refer
226 then?

A. I judged to a wording that there is in that decree of Judge Pryor's.

406 Q. Well, would you speak of a command embodied in a court decree as a promise?

A. Well, I may be referring to the wrong document, it may be in regard to the report of C. W. Dayton, the Referee, I cannot exactly locate in which document it appeared.

407 Q. You knew about the lot in Woodlawn, didn't you, when it was bought?

A. Yes, sir.

408 Q. It was bought in Mr. Fayerweather's life time?

A. In Mr. Fayerweather's life time, yes, sir.

409 Q. And the only interment which has been made in that lot is of Mr. Fayerweather's remains, is it not?

Mr. Bovee: We object to it as incompetent, irrelevant and immaterial.

A. Certainly not. I understood—in fact Mrs. Fayerweather is interred there.

410 Q. But I mean in Mrs. Fayerweather's life time the only interment was Mr. Fayerweather?

A. Only Mr. Fayerweather as far as I know.

411 Q. Then at the time of the settlement with Mrs.
227 Fayerweather or the agreement for a settlement the same impediment existed, if it be an impediment, to the deeding of the lot by the executors to Mrs. Fayerweather as exists now to its conveyance to her executor or to her heirs at law; that is to say, there was then the condition of an interment made?

A. So I understand, yes, sir.

Mr. Bovee: One moment. We object to the question as assuming something which has not been proved and as irrelevant and immaterial to the issue presented by the special plea.

412 Q. Then so far as you know nothing has occurred since the agreement made by Mrs. Fayerweather to
228 prevent the conveyance of the Woodlawn lot by the executors in conformity with any agreement that was made with Mrs. Fayerweather in her life time?

Mr. Bovee: Same objection.

A. None other than the existence of the law.

413 Q. Well, that existed when the agreement with her was made, did it not?

Mr. Bovee: Same objection.

A. Yes, sir, I believe so.

414 Q. Then, having made an agreement with her which, according to the present claim, was illegal, Mr. Bulkley puts himself upon the ground that it is not lawful to carry it out, is that it?

Mr. Bovee: We object to the question as assuming

something which never has been proven, and as irrelevant and immaterial to the issues presented by the special plea.

A. I so understand it.

415 Q. Mr. Myrick, when this gift of $100,000 to Mrs. Beardsley had been inserted in the deed of gift and finally paid, was it paid by check prepared for signature by you?

Mr. Bovee: Same objection.

A. I think it was not paid in that way.

229 416 Q. Was it paid by a check on the Central Trust Company?

A. No, sir.

417 Q. How was it paid?

Mr. Bovee: Same objection.

A. I think it was paid by her taking securities that Mr. Fayerweather owned, or the executors of the estate owned, which were brought down to a cash basis on the day of delivery.

418 Q. When you say you think, you mean that is your recollection of a transaction that you knew about, don't you?

A. I have a true record of it and that is my remem-

230 brance of it. I state it because I think that the legacies were paid by checks and the presents or the amounts specified in the deed of gift were paid in securities, that is the way I place it.

419 Q. How long did Mr. Fayerweather's remains lie in the receiving vault after his death before they were actually interred on this Woodlawn lot?

Mr. Bovee: We object to it as irrelevant and immaterial to the issue presented by the special plea.

A. I do not know.

420 Q. Well, they remained there some time while the mausoleum was being built, did they not?

Mr. Bovee: Same objection.

A. That is my remembrance.

421 Q. And how long did that take?

Mr. Bovee: Same objection. The witness has already said that he did not know.

A. I cannot tell you.

422 Q. Well, you made the payments for the work on the monument or mausoleum from time to time, didn't you?

A. Yes, sir.

423 Q. And can you from your memory state when that was completed?

231 Mr. Bovee: We object to it as irrelevant and immaterial to the issues presented by the special plea.

A. I can only judge by the final payment made on the order by the architect.

424 Q. Do you remember about when that was?

Mr. Bovee: Same objection.

A. Only in a general way; I should say some time in the summer.

425 Q. The summer of 1891.

A. That is my remembrance.

426 Q. And it was after that that Mr. Fayerweather's remains were placed in that vault or mausoleum, was it not?

232 A. I do not know when they were placed there, I do not think I was present at the time.

427 Q. Well, they were not there on the 5th of March, 1891, were they?

Mr. Bovee: Same objection.

A. I would say not, or I would conclude not.

Mr. Bovee: I move to strike out that conclusion of the witness.

428 Q. So that whatever agreement was made on or about the 5th day of March, 1891, providing that the executors would execute to Mrs. Lucy Fayerweather a deed of the lot in Woodlawn Cemetery intended for the remains of Mr. Fayerweather, was not then possible of

performance by reason of any interment then or previously having been made upon that lot, is not that so?

Mr. Bovee: One moment. We object to the question as incompetent and as assuming something that has not been proven.

Mr. Sherman: You put it in evidence yourself.

Mr. Bovee: As irrelevant——Mr. Stenographer you please take my objection without any interruption——irrelevant and immaterial to the issue presented by the special plea.

233 A. My understanding is that the law still intervened.

429 Q. On the 5th of March, 1891?

A. Yes, sir.

430 Q. If Mr. Fayerweather's remains were then in the receiving vault and the tomb had not then been finished, nor until the summer of 1891?

A. Yes, sir, my remembrance of the law as quoted leads me to that belief.

431 Q. Well, did anything that Mr. Bulkley said lead him to that belief?

Mr. Bovee: I object to that as immaterial and irrelevant to any issue presented by the special plea, I
234 object to the question as incompetent.

A. That is a question that is impossible for me to answer. I can only draw conclusions.

432 Q. He never said anything about that then?

A. I do not remember whether that came up when the question was discussed regarding the claim of Mr. Reynolds.

433 Q. Let me see if I can refresh your memory, Mr. Myrick. In the Five College record which has been introduced in evidence by the defendants, at page 355 there is a paper purporting to be the exercise of a power by the executors under the deed of gift in order to carry out a settlement with Mrs. Fayerweather, and it contains at folio 1422 these words: "And we also agree to execute

to her a deed of the lot in Woodlawn Cemetery intended for the remains of Mr. Fayerweather." "That purports to be executed March 5th, 1891." Now was it not to the promise that Mr. Bulkley referred when he said notwithstanding any promise the state law would prevent the execution of the deed by the executors?

Mr. Bovee: We object to the question as irrelevant and immaterial to any issue presented by the special plea, and that under the judgment and decision of Judge Truax in the Five Colleges' Action the deed of gift made by
235 the executors was abrogated and set aside.

A. The statement by me referred only to the point raised by Mr. Reynolds after the decree of Judge Pryor. Now that you read that, you bring up to me another circumstance regarding that same piece of property. I think that early after the settlement the papers pertaining to the Woodlawn lot were sent to Mrs. Fayerweather. It seems to me that there was some talk at that time that—

Mr. Bovee: Mr. Myrick is there any question which calls for this statement from you?

Mr. Sherman: I protest against the interruption of my examination by the counsel for the defendants, and insist that the witness be allowed to finish his
236 answer. Now Mr. Myrick proceed.

Mr. Bovee: I object to the witness volunteering any statement not called for by any question propounded by counsel for the complainants.

434 Q. Mr. Myrick, proceed with the answer that you were giving and state any fact known to you in reference to the attempt of the executors, if any, to carry out the agreement to convey or to execute to Mrs. Lucy Fayerweather a deed of the lot in Woodlawn Cemetery intended for the remains of Mr. Fayerweather.

Mr. Bovee: I object to it as irrelevant and immaterial to any issues presented by the special plea. I object also to the question of the counsel for the complainants upon

the ground that it is too general and does not point to any particular fact.

(Question No. 434 repeated by stenographer.)

A. I think they sent all the papers they had in their possession pertaining to the lot; I think the deed was delivered to her

435 Q. You mean the deed to Mr. Fayerweather from the Woodlawn Cemetery Association?

237 A. Yes, sir, that is my remembrance now.

436 Q. They did not send any deed executed by them, did they?

A. Not to my knowledge; I never knew it if they did.

437 Q. Well, do you know that they sent Mrs. Fayerweather any deed, do you personally know that?

Mr. Bovee: The same objection.

A. Well, there is an impression in my mind that they did?

Mr. Bovee: I move to strike out the impressions of the witness.

Mr. Sherman: I consent, and the question is re-

238 peated.

(Question No. 437 repeated by stenographer.)

A. Any deed is pretty broad.

438 Q. Any deed of the Woodlawn lot?

A. My remembrance is that they sent to Mrs. Fayerweather the deed to Mr. Fayerweather of that Woodlawn lot.

439 Q. A deed by Mr. Fayerweather to Mrs. Fayerweather?

A. No, I said the deed to Mr. Fayerweather.

440 Q. Into Mr. Fayerweather, conveying the title into him?

A. Yes, sir.

441 Q. But that was not a deed executed by the executors?

A. No, sir.

442 Q. Or either of them?

A. No, sir, it was the original deed to him, that is my remembrance.

443 Q. Then so far as you know that is all they ever did towards complying with the provisions of this paper which I have just read and which is at folio 1422 of 239 the Five College Record?

A. So far as I know.

444 Q. When this settlement had been arrived at and the releases had been delivered to the executors, and along in June 1891, were there payments made of household expenses and bills for domestic affairs which had been incurred by Mrs. Fayerweather from the the time of her husband's death down to the time of the settlement, and did you draw checks which were signed by the executors for such payments?

Mr. Bovee: We object to this as irrelevant and immamaterial to the issue presented by the special plea.

A. Did you specify a month?

240 445 Q. Some time in June I nnderstood it was.

A. Oh, no, the payments were immediately commenced.

446 Q. Immediately—you mean by immediately, when?

A. Some time in March.

447 Q. In March, 1891?

A. March, 1891.

448 Q. But after the delivery of the releases?

A. That is my remembrance.

449 Q. Immediately thereafter you mean?

A. That is my remembrance.

450 Q. And do you remember what was the nature of accumulated debts which you paid at that time for Mrs. Fayerweather?

Mr. Bovee: We object to it as irrelevant and immaterial to any issue presented by the special plea. Counsel for the defendants reiterate the stipulation which they have heretofore tendered to remove all irrelevant matter from the record, and they protest against the examination.

Mr. Sherman: Counsel for the complainants protests against the delay and interference with this examination because of the unnecessary repetition at large of the objections taken, and especially to the repetition of
241 a tender of a stipulation, so called, which has been repeatedly declined and which is made necessary upon the face of the tender by the circumstances that the counsel for the defendants have insisted upon going outside of the issue of the plea into evidence at large in the cause.

(Question No. 450 repeated by stenographer.)

A. They varied in every phase from a grocer's bill to a milliner's bill and the undertaker's bill.

Mr. Bovee: Mr. Myrick, you are asked if you know the amount.

242 Mr. Sherman: Take this interruption down.

Mr. Bovee: That was the question.

451 Q. Mr. Myrick. I am not submitting to have my questions interpreted by this gentleman; I wish you would answer them according to your understanding of them.

A. If my understanding is correct you asked as to the nature of the bills and not the amount.

452 Q. I do not want you to go into all the raft of little matters; I think you understand the scope of the question and I shall be satisfied to take your interpretation of it. You had better hear it read again perhaps in view of the interruption.

(Question 450 repeated by the stenographer.)

Mr. Sherman: You understood it I think.

The Witness: I think there was a thousand dollars paid Mr. Vaughan for money that he advanced to Miss Joyce. There was $250 I think that was advanced by Edward R. Ladew; there was another payment I think of $240, I cannot quite place that, what it was for. Then there was a payment made by us I think in the neighborhood of $200 for some diamonds that Mrs. Fayerweather had bought, as I understand it, prior to Mr. Fayerweather's death and which had not been paid for.

243 Then there was a payment made for some diamonds bought in Bridgeport.

453 Q. Bought by whom?

A. Well, Miss Joyce and Mr. Beardsley were the principals, I believe, in that matter. As I understood it they had been bought by Mr. Beardsley under direction from Mr. Fayerweather.

454 Q. Were they presents to somebody?

Mr. Bovee: Same objection to this question.

A. I think it was a present to Miss Joyce.

455 Q. Well, go on.

A. And then the various bills, grocers, undertakers,

244 florists, doctors, butchers, all the various bills that would necessarily occur in carrying on a household.

456 Q. And those had accumulated from Mr. Fayerweather's death, had they?

A. To the best of my remembrance, yes, sir.

Mr. Bovee: When you say Miss Joyce you mean Mrs. Reynolds?

The Witness: Yes, sir.

457 Q. And was there a stable maintained at that time?

A. Yes, sir.

458 Q. And were there bills for the stable?

Mr. Bovee: Same objection.

A. Yes, there must have been. I remember one feed bill.

459 Q. Anything for servants' wages or coachman?

Mr. Bovee: Same objection.

A. No, I would not meet with that. I believe the wages were generally paid out of money that I would carry to the house at the direction of Mr. Fayerweather or Miss Joyce.

460 Q. No, I am talking now about the period from Mr. Fayerweather's death down to March, 1891. During that period you carried no money to the house to pay servants, did you?

A. I do not remember whether there was a payment
245 made to the coachman or not, I know I paid a feed bill, that I can remember.

461 Q. Will you answer my last question?

Mr. Bovee: Same objection.

(Question No. 460 repeated by stenographer.)

The Witness: No, sir, I did not.

462 Q. You speak of having paid a loan made by Mr. Vaughan.

A. I repaid a loan.

463 Q. Yes, I understood you to say so. A thousand dollars?

A. I misunderstood you.

246 464 Q. I am referring to your testimony of course.

A. I did repay a loan that was made by him to Miss Joyce.

465 Q. When was it made I asked you?

A. It is my remembrance that it was made within a day or two of Mr. Fayerweather's death, either Sunday or Monday.

Mr. Bovee: Do you mean Miss Joyce the lady who is now Mrs. Reynolds?

The Witness: Yes, he advanced the money to her and it was afterwards repaid.

466 Q. That was before any question had arisen over the will?

A. Yes, sir, that is, the payment by Mr. Vaughan was. The payment afterwards was made after the settlement.

467 Q. Then from the time of Mr. Fayerweather's death or from the time a day or two afterwards, no provision was made out of the estate of Mrs. Fayerweather's maintenance or for the support of her household or for her necessities until after she had signed the release and it had been delivered to the executors, is that correct?

Mr. Bovee: One moment. We object to this question as assuming something which has not been proven, as calling for a conclusion, as irrelevant and immaterial to the issue presented by the special plea; also upon the ground that it is impossible for the witness to speak
247 for the executors or to tell what they did or did not do.

A. At this moment I do not remember of any payment being made by the executors to Mrs. Fayerweather except it be the one of one thousand dollars advanced by Mr. Vaughan. That is my memory at the moment.

468 Q. Well, that advance was a personal advance out of his own pocket and repaid to him as such, was it not?

Mr. Bovee: Same objection.

A. I so understood it.

469 Q. He never claimed any credit of any kind which you are aware of as executor for that payment, did he?

Mr. Bovee: I object to it as incompetent, irrelevant
448 and immaterial. The accounts will speak for themselves as to what is there claimed.

470 Q. I mean for his payment to Miss Joyce.

Mr. Bovee: Same objection.

471 Q. Not for yours to him?

Mr. Bovee: Same objection.

A. I understood it as simply a kindness on the part of Mr. Vaughan to advance money to her for use.

Mr. Bovee: For Mrs. Fayerweather's use?

The Witness: No, for the use of the household, and Mrs. Fayerweather also of course.

472 Q. Did you see Mr. Vaughan shake his fist under Miss Joyce's nose in the Surrogates' Court as disclosed

by the Five College Record which the defendants have introduced in evidence?

A. No, sir.

473 Q. Did you hear Mr. Vaughan say to Miss Joyce in the Surrogates' Court in substance this: "Miss Joyce, I will fight this thing as long as there is a dollar left of the Fayerweather money and as long as I have a dollar of my own private fortune, and I want you to tell Mrs. Fayerweather this, and I mean every word I say?"

Mr. Bovee: Same objection.

249 A. I did not.

474 Q. Mr. Myrick, was Mr. Daniel B. Fayerweather attached to his wife, was he fond of her?

Mr. Bovee: We object to it as irrelevant and immaterial to the issue presented by the special plea.

A. I know of nothing to the contrary.

475 Q. Well, don't you know more than that?

Mr. Bovee: Same objection.

A. That is a pretty difficult question for a man to answer.

476 Q. Is it?

A. Yes, sir.

477 Q. Did you ever see them together?

250 A. Oh, yes.

478 Q. How many times?

Mr. Bovee: Same objection.

A. Generally when I went to the house she and Miss Joyce were in the sitting room where he was there; whenever he was at any seaside place she was generally there; I do not know of anything that I ever saw that would indicate he was not attached to her.

479 Q. Well, for how many years have you seen them together off and on?

Mr. Bovee: Same objection.

A. Well, it was during the last three years of his life that I went often to his house; in fact, I—let me see

—yes, it was within three years of his life that I first went to his house.

480 Q. You mean within three years of the end of his life?

A. Yes, sir, three years from the end of his life was when I commenced going to his house generally every Friday evening and sometimes during the week.

481 Q. Now Mr. Myrick, you were received without formality and freely admitted to the domestic usual living rooms and parts of the house, were you not?

251 Mr. Bovee: Same objection.

A. I was apparently freely admitted at the front door; sometimes I rested in the parlor, other times I was invited to go directly up into the front sitting room; I do not remember of ever having been in his dining room but once, and then I took dinner with him.

482 Q. Well, you were his confidential and trusted man, were you not?

A. I so considered myself.

483 Q. Now having that attitude and intercourse with him and his family, you consider, do you not, that he was attached to his wife and very fond of her?

Mr. Bovee: Objected to as incompetent and as call-
252 ing for the opinion of the witness and as irrelevant and immaterial to the issues presented by the special plea.

A. Why I naturally concluded that he was attached to his wife; the degrees of attachment or demonstration of it varying with various parties.

484 Q. Mrs. Fayerweather was an invalid before he became one, was she not?

Mr. Bovee: I object to it as incompetent and as calling for the opinion of the witness, and as irrelevant and immaterial to the issues presented by the special plea, and also that the witness is not shown to be competent to answer the question.

A. I do not know the date at which he could be con-

sidered as becoming an invalid, nor do I know the date of Mrs. Fayerweather's being so considered.

485 Q. How many years before Mr. Fayerweather's death did you draw checks to be paid doctors for attendance upon him?

Mr. Bovee: I object to it as irrelevant and immaterial to the issues presented by the special plea.

A. Attended upon him?

486 Q. And her; let us put it all in one question.

A. I think that his doctors' bills were paid by the
253 check of the firm prior to the last two years of his life, and then I drew his checks principally.

487 Q. How is it about Mrs. Fayerweather?

A. I think that she was attended——

Mr. Bovee: The same objection.

Mr. Sherman: Proceed.

The Witness: Up to a date about two or three years prior to his death I think they were attended by the same doctor, Dr. Vedder. Afterwards, at some time, I do not remember the date of its commencement, Dr. Irwin, treated her more particularly.

488 Q. Now let me ask you, Mr. Myrick, did you go often to the house in the early period following the
254 death of Mr. Fayerweather?

A. Following the death of Mr. Fayerweather?

489 Q. Yes.

A. No, sir, I do not think I was there—I cannot remember but one case.

490 Q. Well, did you see Mrs. Fayerweather on the Monday following Mr. Fayerweather's death?

A. On the Monday following?

491 Q. Yes.

Mr. Bovee: Same objection to this question.

A. It was Monday or Tuesday of that week.

492 Q. You saw her then?

A. Yes, I saw her then, I know what you refer to. Yes, I am certain that I saw her.

493 Q. Well, what occurred then?

Mr. Bovee: I object to it as irrelevant and immaterial to the issues presented by the special plea.

A. I went there to get a key of the deposit box that she held.

494 Q. At whose suggestion did you go?

Mr. Bovee: Objected to as incompetent, and as irrelevant and immaterial to the issue presented by the special plea.

A. At the suggestion of Mr. Gray I think his name
255 is, one of the persons in charge of the deposit box.

Mr. Blaikie: Mr. Wray.

The Witness: That is it, Mr. Wray.

495 Q. Did Mr. Vaughan have anything to do with it?

Mr. Bovee: Same objection.

A. My remembrance is that Mr. Vaughan was present.

496 Q. Present with you at Mrs. Fayerweather's.

A. Oh, no, at the vault.

497 Q. No, I am talking now about your interview with Mrs. Fayerweather. You went there alone, did you?

A. Oh, went there alone, yes, sir.

498 Q. And did you have some conversation with
256 her about the key?

A. With regard to it?

499 Q. Yes.

A. Yes, sir.

500 Q. What was it?

Mr. Bovee: Same objection.

A. My remembrance is that I cited the suggestion or the statement made by Mr. Wray that the only party who could visit that safe then was Mrs. Fayerweather, or she could delegate somebody to do so. As I remember three of us had the right of admission to the safe, Mr. Fayerweather, his wife, and myself. Mr. Fayerweather having died I considered my powers ceased, and Mrs. Fayerweather's still existed. I went to her, and my re-

membrance is that I said to her, asking for the key, that as Mr. Vaughan was one of the executors that he would in time have to attend to those matters and could be entrusted with the key. The key was delivered and Mr. Vaughan used it.

501 Q. Did Mrs. Fayerweather appear at that time to be aggrieved at the death of her husband?.

Mr. Bovee: I object to the question as incompetent and also upon the ground that the matters sought to be elicited are irrelevant and immaterial to the issues 257 presented by the special plea.

A. Well, I consider it impossible for me to tell how much she was aggrieved. She came I think in the parlor and listened to what I had to say, she talked with me without any special nervousness, in fact had I not known of the death of Mr. Fayerweather I would not have considered that she was unduly or strangely nervous.

502 Q. What was her condition of health apparently?

Mr. Bovee: I object to it as incompetent; the witness has not been shown to be competent to testify; also as irrelevant and immaterial to the issues presented by the special plea.

Mr. Sherman: Now proceed.

258 A. Apparently well.

503 Did she appear to be a person in robust health?

Mr. Bovee: Same objection.

A. In as good health as I had seen her for the past two years.

504 Q. Had that been good health?

Mr. Bovee: Same objection.

A. As far as appearance is concerned, yes, sir.

505 Q. Had she any appearance on her part of good health to compare the last two years with?

Mr. Bovee: I object to the question as calling for the conclusion of the witness, and as irrelevant and immaterial to the issues presented by the special plea.

A. I cannot say that I ever saw any variation in

Mrs. Fayerweather's health as far as her appearance would indicate during the time I knew her.

506 Q. Was it Monday or Tuesday after Mr. Fayerweather's death that this application was made by you for the key?

A. I cannot now tell.

507 Q. What time of day was it?

A. I cannot place that.

508 Q. Morning or night¿

A. I cannot tell whether it was morning or night—

259 there is nothing that I can place it by.

509 Q. Did you take a letter from Mr. Wray to her about the key.

A. That I cannot now answer.

510 Q. Well, have you not an impression that you did?

A. It would be only guess-work; I cannot see that act in my mind.

511 Q. Well, did you present this to Mrs. Fayerweather as an application on your part only or on behalf of the executors?

A. Not the executors, it was because somebody had got to act, and I simply went with Mr. Vaughan because he would act, he was in one sense empowered under

260 the statement that was made in that will to do all that he could before being formally appointed an executor to protect the property and do what he could with it, and I went there because I could not use my key, they would not recognize me but they would recognize the third party, and leading up to it my impression would be that Mr. Wray did send a letter, but I have not the slightest recollection of that act.

512 Q. Well, how did you learn that the safe deposit company would not recognize you, did you apply to them?

A. I cannot tell that, I think that my impression was that I had no right to——

Mr. Bovee: No, no, not your impression, Mr. Myrick, you are not asked for that.

Mr. Sherman: I object to this interruption. You are asked for your memory and if you choose to call it that I have no objection. Now Mr. Myrick proceed.

Mr. Bovee: I object to the question as irrelevant and immaterial to the issues presented by the special plea. The witness has already said that he cannot remember, and we object to any speculations or impressions on the part ot the witness.

261

(Question No. 512 and the answer thereto as far as given repeated by stenographer.)

513 Q. If there is any further answer to that question Mr. Myrick please make it.

A. I think I ceased to act on my own volition.

514 Q. You stated a little while ago that the company would not recognize you any further. Do you mean by that to be understood that you learned that by applying to them?

A. I think that knowledge came at the time that Mr. Vaughan and I went to the vault together.

515 Q. Mr. Vaughan tried with you first to go on
262 with the business without troubling Mrs. Fayerweather, and then you learned that that could not be done without her power, is that right?

A. No, you do not state it fairly.

516 Q. Well, state it fairly then.

A. We went to the vault, as I was under the impression that I had no right to act, and conferred with Mr. Wray, and that was the result, that they knowing the fact that Mr. Fayerweather was dead, that nobody had a right to act unless it was Mrs. Fayerweather, she was the third party who had a right to enter the vault.

517 Q. Well, what immediate occasion was there for dealing with securities in the vault?

Mr. Bovee: One moment. I object to it as incompe-

tent, irrelevant and immaterial and not within any issue presented by the special plea.

A. My remembrance is that there were certain notes in the possession of Mr. Fayerweather or in the estate's box that must be entered for collection so as to be at the bank at which they were made payable on the day on which they matured.

518 Q. And when was that?

A. I cannot answer definitely.

263 519 Q. Was it too pressing to wait for the probate of the will?

A. The results proved so.

520 Q. No, but was that the view at the time? You were not prophets, I suppose, nor the sons of prophets.

A. I can only give you a conclusion, I do not remember the conversation, I know what led up to it.

521 Q. I want to know why you thought it essential to deal with those notes at that time, was it because they were then due or immediately to become due?

A. They were soon to become due, whether it was one day or two days or two weeks, I cannot give you the date, but I know that it was to follow the exact pro-
264 cedure that I had followed in Mr. Fayerweather's life time, to put them in for collection.

522 Q. Now, what could the executors do in advance of the probate of the will about collecting them?

Mr. Bovee: I object to the question as incompetent, irrelevant and immaterial to the issues presented by the special plea and calling for the conclusion of the witness.

A. I can only give you my understanding of the law.

Mr. Bovee: We object to the understanding of the law of the witness.

Mr. Sherman: I will have to get along with mine.

523 Q, You cannot explain any act that those executors

might have done in regard to the collection of those notes prior to the probate of the will, can you?

A. I think they were empowered to put them in collection.

524 Q. Without the probate of the will?

A. Yes, sir.

525 Q. And without letters testamentary?

A. Yes, without letters testamentary.

526 Q. What was the form of these notes, payable to the order of Mr. Fayerweather or indorsed to his order?

A. No, I think they were notes drawn to the order of the party signing them, or drawn to the order of
265 ourselves.

527 Q. Well, were they indorsed at large or to some particular party or indorsee?

A. At large.

528 Q. And not indorsed by Mr. Fayerweather?

A. And not indorsed by Mr. Fayerweather.

529 Q. And payable at the bank?

A. And payable at the bank.

530 Q. Whose notes were they?

Mr. Bovee: Objected to as immaterial and irrelevant to the issues presented by the special plea, and as having nothing to do with this controversy.

A. Well, without referring to the documents it
266 would be mere guess-work.

Mr. Bovee: I object to the guess-work of the witness.

531 Q. Well, give us the best you can.

A. I think the first notes to become due were those of Pingree & Smith.

532 Q. Michigan people?

A. Yes, sir.

533 Q. Of Detroit, Michigan?

A. Yes, sir.

534 Q. Of what amount, $53,000?

A. No, I do not think it was as much as that, those that were falling due in the next month, I think there were three five thousand dollar notes.

Adjourned to January 16th, 1901, at 2 P. M.

267

268

FAYERWEATHER
vs.
RITCH,

REYNOLDS
vs.
269 RITCH.

NEW YORK, January 16th, 1902.

Met pursuant to adjournment. Present: The Examiner, Mr. Sherman, Mr. Blaikie, Mr. Bovee, Mr. Carnochan, Mr. McLoughlin, a representative of Butler, Notman, Joline & Mynderse, a representative of Nash & Jones, and a representative of Root, Howard,
270 Winthrop & Stimson.

Continuation of the examination of *F. B. MYRICK.*

By Mr. Sherman:

535 Q. Mr. Myrick, did it ever happen before in your intercourse with Mr. Fayerweather to dispose of any of his property under more oral direction?

Mr. Bovee: I object to it as irrelevant and immaterial to the issue presented by the special plea of the defendants, and irrelevant and immaterial to any issue presented in this case.

A. I cannot think at the moment of but one or two cases.

536 Q. How long before?

A. I cannot answer.

537 Q. A year or a few weeks?

A. Oh, it was not a few weeks, it was a lapse of time, possibly in the neighborhood of a year or a year or more.

536 Q. And what were those two occasions?

203 Mr. Bovee: Same objection.

A. One was a note of John McCoy's that he owed

271 Mr. Fayerweather and I gave it up to him at Mr. Fayerweather's direction; I think there was another one——

539 Q. What was the amount of that, in order not to go back to it again?

Mr. Bovee: Same objection.

A. $250 or $450.

540 Q. $250 or $450?

A. I cannot place the exact amount.

541 Q. And what was the other?

Mr. Bovee: Same objection.

A. I think it was a loan that Mr. Fayerweather made to a man named Warner. That was $200 as I

272 remember it. I think he gave it to him.

452 Q. You said at your last examination that some conversation occurred between Mr. Fayerweather and you as to whether he would make the gifts which he intended to make to his next of kin in his life time or by a testamentary paper, or that in substance. When did that conversation occur?

Mr. Bovee: Same objection.

A. That occurred the Monday morning before his death.

543 Q. November 10th?

A. November 10th.

544 Q. 1890?

A. 1890.

545 Q. Was that in the part of the interview at which Mr. Vaughan was present or in which he was not present.

Mr. Bovee: Same objection.

A. I think he was present. I have a slight remembrance of talking at my private interview, and it came up in the second interview, and it came up in the third interview with me Wednesday.

546 Q. Well, in those remarks did Mr. Fayerweather refer to any one but his niece Mrs. Beardsley?

Mr. Bovee: Same objection.

273 A. I do not think that he referred to Mrs. Beardsley; I understood it to be more particularly—I knew nothing about the bequest to Mrs. Beardsley, I only knew from his conversation that there were two reasons——

547 Q. Well, what was the substance of what he said about that at that time?

Mr. Bovee: Same objection.

548 Q. Or the words if you can remember, if not, give the substance.

A. Well, I cannot give you the words.

549 Q. Well, the substance.

A. The conversation resulted in this——

Mr. Bovee: I object to what the conversation re-
274 sulted in as incompetent, irrelevant and immaterial to any issue raised by the special plea.

550 Q. Give the substance as near as you can remember it.

A. I understood a will was to be made in which those——

Mr. Bovee: I object to to the understanding of the witness.

551 Q. Mr. Myrick please try to reduce it to the form of the substance of what he said, so that it may not be open to the technical objection that you are drawing your own conclusions. I want the substance of what Mr. Fayerweather said, inasmuch as you say you cannot remember the exact words.

Mr. Bovee: I object to the testimony as incompetent, irrelevant and immaterial to any issue presented by the special plea.

A. I must say that I am incapable of forming it in any other way than I have attempted.

552 Q. Well, so long as you give us the substance of what Mr. Fayerweather said, give it in any way that you see fit.

Mr. Bovee: Same objection.

A. That the amounts that were to be given them by
275 will were to be given privately.

553 Q. In his life time?

A. In his life time.

554 Q. Given them—whom did he say?

A. Well, he spoke to me of his nieces.

555 Q. What nieces?

A. Well, that I did not then know.

556 Q. Did he say where they lived?

A. It is impossible for me to answer that definitely.

557 Q. Did he say how many nieces he had?

A. He did not.

558 Q. Well, it was more than one, was it since you say nieces?

276 A. It was.

559 Q. And it was not Mrs. Beardsley?

A. Not specified by name, there was nobody specified by name.

560 But you have in your previous answer stated that it did not include Mrs. Beardsley; but she was his niece was she not?

A. She was his niece.

561 Q. Now there were nieces besides Mrs. Beardsley that he spoke of, were there?

A. In some way the conclusion came to my mind that it was two persons.

562 Q. Did he state where they were?

A. That I say is indefinite.

563 Q. Well, were they in New York?

A. I did not know where they were.

564 Q. How did he propose to hand them over securities if they were not in New York?

Mr. Bovee: I object to the question as incompetent, irrelevant and immaterial; and as irrelevant to any issue presented by the special plea. The witness has already said he could not tell what Mr. Fayerweather said.

A. I do not know. I drew a conclusion but I do
277 not know.

Mr. Bovee: We object to any conclusion of the witness whatsoever. If he can recall the testimony he must give the testimony.

565 Q. Well, do you mean by a conclusion that that is the substance of the statement made by Mr. Fayerweather as it remains in your mind?

Mr. Bovee: We object to the question as incompetent.

A. I think I finally stated it.

566 Q. Well, is that what you mean?

A. That he was to give them the money that was coming to them in some way privately, no will was to be made; he said — this was Wednesday — he said "If
278 anything happens to me they will be protected."

567 Q. This was the 12th of November?

A. Yes, sir.

568 Q. He said what?

A. He said, "If anything happens to me they will be protected under the will." That was the last time I saw him. Now then who they were is simply what my impression originally was, and as I can remember it it was simply two.

569 Q. Did he say they were daughters of his brother William?

Mr. Bovee: I object to the question as irrelevant and immaterial.

A. I do not know whether he did or not.

570 Q. Did he say anything about Muscatine being a small place?

Mr. Bovee: Same objection.

A. Not to me.

571 Q. Or in your hearing to anybody?

A. Or in my hearing; that is, that I remember; I have no remembrance of it.

572 Q. Well, as I understand you the conversation on Monday, November 10th, 1890, was as to whether he should leave his testamentary gifts in force or should
279 before his death give the same amount to these persons, is that so?

Mr. Bovee: We object to that question as assuming something which has not been proven, and the witness has already said that he could not recall what Mr. Fayerweather said, and any testimony by the witness upon the subject would necessarily be a supposition and speculation by the witness without being the exact fact. We also object to it as incompetent, irrelevant and immaterial to any issue raised by the special plea. I want to say to you that you are to give testimony and what you know.

Mr. Sherman: I object to this. This is a contempt of court.

280 Mr. Bovee: And we further object to this examination as a gross and outrageous perversion of the privilege of the counsel under guise of the examination under Rule 67 of this court.

Mr. Sherman: Counsel for the complainants protests against the repeated interruptions by Mr. Bovee as counsel for the defendants, and also objects to Mr. Bovee's anticipating the answer by remarks addressed to the witness, and also protests against the assumption by Mr. Bovee of the right to instruct the witness by way of interpretation or direction as to the answers the witness shall make to the questions of counsel for the complainants.

(Question No. 572 repeated by stenographer.)

A. Change that to Wednesday and it will be correct.

573 Q. Was it subsequently then in the interview on Wednesday that he made those other statements which you have made about his purpose to make a will under which their rights should be protected?

Mr. Bovee: Same objection as before.

A. Confirmed them, Wednesday.

574 Q. That was the conclusion of the conversation, was it?

281 A. My conclusion of the conversation.

575 Q. That statement was at the end of the conversation, was it?

A. Yes, sir.

576 Q. That was what was finally decided as announced by Mr. Fayerweather, was it, on Wednesday?

Mr. Bovee: Same objection.

A. As I have stated it, yes.

577 Q. Do you know the present whereabouts of the exhibits introduced on the trial of the so-called Five College action?

Mr. Bovee: Same objection.

A. Only two or three.

578 Q. And which are these, the whereabouts of 282 which you know?

A. The powers of attorney of Miss Fayerweather and Mrs. Achter to Morris B. Beardsley.

579 Q. Only those?

A. There is an agreement between Edward R. Ladew and Mr. Fayerweather about the transfer of property. Whether that was introduced at the Amherst trial or before Scott Lord and there marked as an exhibit, I cannot now remember.

580 Well, that paper is now in your possession?

A. In our safe.

Mr. Sherman: I call on the counsel for the defendants to produce all the letters which were marked in evidence

in the record in the Five College action which the defendants have introduced in evidence in this case, the originals thereof.

Mr. Bovee: Counsel for the defendants states that at this time it is impossible to produce the papers called for by counsel for the complainants, and whether those papers can be produced upon this examination will have to be determined after this hearing. And counsel for the defendants object to the demand made by the counsel for the complainants upon the ground that the papers
F. 283 themselves are irrelevant and immaterial to the issue presented by the special plea.

Mr. Sherman: Counsel for the complainants offers in evidence the correspondence between Daniel B. Fayerweather and Thomas G. Ritch, also the correspondence between Henry B. Vaughan or Hall & Vaughan and Daniel B. Fayerweather and Miss Joyce, Miss Anner Amelia Joyce, as the same appear in the Five College record as introduced in this case by the defendants.

Mr. Bovee: Counsel for the defendants object to the papers as irrelevant and immaterial to any issue presented by the special plea; also upon the ground, as shown by the question itself, that the papers are already printed at large in the record of Amherst against Ritch here-
F. 284 tofore offered in evidence; also upon the ground that the offer of the papers in evidence is too indefinite and too obscure to be susceptible of exact meaning.

Mr. Sherman: Counsel for the complainants requests the stenographer to transcribe into this record in connection with the offer the letters in question. I wont stop to read them to him now.

Mr. Bovee: We object to any such thing being done in this record. It does not appear what the papers are that the stenographer shall transcribe into the record.

Mr. Sherman: Page 294: "11 East 57th Street"—

Mr. Bovee: One moment. Counsel for defendants ob-

ject to counsel for the complainants reading into the record in this case—what page is that, Mr. Sherman?

Mr. Sherman: I am not here to be examined. If you have an objection to make state it and I will go on.

Mr. Bovee: If you do not care to answer a courteous question I address to you to know what you are putting into this record, I will make the objection.

Mr. Sherman: It is a mere pretense to delay the proceeding. You know perfectly well what I am putting in.

Mr. Bovee: I do know that you are reading from
F. 285 page 294.

Mr. Sherman: There is no use bandying words with you.

Mr. Bovee: Counsel for defendants object to the reading into the record a paper which has not been stated, as irrelevant and immaterial to the issue presented by the special plea in this case, and incompetent.

Mr. Sherman: (reading):

"11 East 57th Street, November 3rd, 1890.

"Mr. Thomas G. Ritch:

"Dear Sir—Will you, when next coming this "way, kindly bring the balance of the copy of my "will?

"Dictated. D. B. Fayerweather."

F. 286 Mr. Sherman: Page 295——

Mr. Bovee: The same objection.

Mr. Sherman: (reading):

"11 East 57th Street,
November 13, 1890.

"My Dear Mr. Ritch—Will you please deliver "to Mr. Henry B. Vaughan my original will, and "first, second and third codicils thereto, which "have been kept in your possession, as I wish to "examine them with him in connection with the "copies which you have furnished me.

"Yours truly,
"D. B. Fayerweather."

Mr. Sherman: Page 297.

Mr. Bovee: Same objection to this paper.

Mr. Sherman: (reading):

"11 East Fifty-Seventh Street, N. Y. City,
November 13, 1890.

"Mr. Thomas G. Ritch:

"Dear Sir—I have examined my original will,
"and the first, second and third codicils thereto,
"handed by you to Mr. Vaughan at my request.

"By the tenth article of my will I left my
F. 287 "residuary estate to my executors in trust to be
"equally divided among certain corporations and
"institutions.

"By the first codicil, it seems that I revoked
"this tenth article of my will, and then made the
"following disposition of my residuary estate:

"III. All the rest and residue of my estate,
"of whatsoever character and wheresoever situated
"the same may be, of which I shall die possessed
"and remaining after the provisions of the first
"nine paragraphs of my will have been fully com-
"plied with and carried into effect, I give, devise
"and bequeath to Justus L. Bulkley and Thomas
"G. Ritch, named in the eleventh paragraph of
F. 288 "my said will, to them and their heirs forever."

"Please advise me at once, in writing, what
"is the legal effect of this clause, and to whom,
"and how would my residuary estate go in case
"of my death, supposing the first codicil to remain
"in force.

"Yours truly,
"D. B. Fayerweather."

Mr. Sherman: Page 298: "Arnoux, Ritch & Woodford"——

Mr. Bovee: The same objection to this letter.

Mr. Sherman: (reading):

"Arnoux, Ritch & Woodford,
"William H. Arnoux,
"Thomas G. Ritch,
"Stewart L. Woodford,
"Haley Fiske,
"C. N. Bovee, Jr.,
"William C. Wallace."

"18 Wall Street, New York,
November 14th, 1890.

F. 289 "D. B. Fayerweather, Esq.

"Dear Sir—The intention of the change in "question was to enable Messrs. Bulkley and my- "self to carry out the intentions of the will as "modified by the various private memoranda in "my possession. Neither Mr. Bulkley nor myself "would have any moral right to treat any portion "of your estate otherwise than as we know would "conform to your wishes. I suggest that I call "on you with these, and if still approved by you, "that they be left in a sealed package with Miss "Joyce, or any one named by you. The legal effect "of the clause in question is to vest the title to "the residuary estate in Messrs. Bulkley and my-
F. 290 "self, but as I have said, neither Mr. Bulkley nor "I would wish to derive any personal benefit un- "der this codicil.

"Yours truly,
"Thomas G. Ritch."

Mr. Sherman: Page 302.

Mr. Bovee: Same objection.

Mr. Sherman: (reading):

"New York, November 13th, 1890.

"My Dear Miss Joyce—I have had two long "talks with Mr. Vaughan to-day and yesterday,

"and I fear Mr. Fayerweather is worrying over his
"business matters. Mr. Vaughan says that Mr. F.
"is too ill to be seen, and so I would be glad to
"have you say to him, if you think it well, that I
"will execute any paper or say anything in your
"presence, or in that of any one else that will en-
"able him to feel that his wishes will be"—
(partly written and erased, what seem to be
the letters c—o—mp—l, as if the writer had
F. 291 started to write "complied with" and changed it)—
"carried out to the letter. It would be a misfor-
"tune indeed to me to lose his confidence after so
"many years, through any misunderstanding now.
"The will and codicils provide carefully for the
"institutions in which he was interested and for
"the relatives and friends to whom he was at-
"tached, and I know that, at the time the papers
"were drawn, the reasons for each paragraph
"were considered and approved by him, the object
"being to prevent any contests.

"I write thus freely to you, because you have
"known Mr. Fayerweather's affairs, and I believe
"that you, as well as he, believe that I have only
F. 292 "tried to do my duty.

"If at any time you or Mr. F. would like to
"see me, I will call.

"Sincerely yours,

"Thos. G. Ritch.

Mr. Sherman: Page 504.

Mr. Bovee: Same objection.

Mr. Sherman: (reading):

"Heading of Hall & Vaughan, hides and leather,
"18 Ferry Street, New York, November 13, 1890.

"Dear Miss Joyce: Will you please explain
"to Mr. Fayerweather that I have obtained the
"papers from Mr. Ritch. At first Mr. Ritch

"stated that he would take the papers to Mr. F., "but I reminded him that the letter read to give "them to me, and he said he would do it. He "grew as white, however, as the paper upon which "I am writing. I will deliver the second letter "to-morrow. There is, however, but little use in "this as I am convinced from his manner that Mr. "Ritch knew exactly what he was doing. Truly "yours, Hall & Vaughan."

F. 293 Mr. Sherman: I read in evidence from the Five College record——

Mr. Bovee: The same objection to this.

Mr. Sherman: The paper and envelope marked therein Exhibits G and G—a. G—a is as follows:

Mr. Bovee: What page is that?

Mr. Sherman: Pages 287 and 288.

Mr. Bovee: The same objection to this testimony.

Mr. Sherman: (reading):

"Messrs. J. L. Bulkley and T. G. Ritch. To "be opened in case of my death."

Exhibit G is as follows, on the letter-heading of Fayerweather & Ladew, New York, P. O. Box 2701,
F. 294 December 11, 1884:

"Private Memoraudum.

"I have made Messrs. Bulkley & Ritch my "residuary legatees, in the confidence that there- "by my intentions as expressed in my will shall "be carried into effect, and without litigations on "the part of any person or persons interested.

"In case of my death I trust they will take "such steps, by will or otherwise, as will protect "my estate against the contingency of the death "of either, before my estate is settled and dis- "tributed.

"D. B. Fayerweather."

I read in evidence from page 885 of the Five College record Exhibit H—1 of proponents:

"Arnoux, Ritch & Woodford,
"18 Wall Street,
"New York, Oct. 6, 1884.

"This certifies that I have executed my will
"of this date, having been advised by my counsel
"of the provisions and restrictions of the laws of
"this State relative to benevolent corporations.
F. 295 "I trust my heirs will permit the provisions
"of this my will to be carried into effect.
"D. B. Fayerweather."

Mr. Bovee: Note the same objection to that.

Mr. Sherman: I also read in evidence from page 884 of the same record the Exhibits No. H—2, proponents, as follows:

Mr. Bovee: Same objection.

Mr. Sherman: (reading):

"Private Memorandum.

"Having made inquiries with regard to Hamp-
"ton and Lincoln Universities, it is my judgment
"that the bequests to them should be withheld.
F. 296 "I think the bequest to Cornell University
"should not exceed $100,000.

"If the Northwestern University, at Evanston,
"Illinois, is in a prosperous condition, I would
"recommend that $100,000 be given it.

"If the following persons are in my employ
"at the time of my death, I suggest that they re-
"ceive the following sums:
"$1,000 $1,500 $1,000
"Rogers and Blake $500 each, Gould, Campbell
" 500
"Stone $300 each, and Carpenter $250, also James,

"who now opens and closes the store, $100, John
500
"Dixon $200.

"I also wish that $1,000 be given Miss Joyce "immediately after my decease in addition to the "provisions made for her by my will.

"D. B. Fayerweather.

"Mch 22, 1889.
"John C. Baylor."

F. 297 Mr. Sherman: Counsel for the complainants calls upon the counsel for the defendants to produce Exhibit P contained in the Five College record and described as the will of 1880.

Mr. Bovee: Counsel for the defendants in answer to the demand of counsel for the complainants states that he is not prepared at this time to produce the paper called for as no subpœna has been issued for the production of the paper and no opportunity offered for having the same present at this time.

Mr. Sherman: Counsel for the complainants offers in evidence the will of 1880 as it appears in the Five College record from 887 to 892.

Mr. Bovee: Counsel for the defendants objects
F. 208 upon the ground that whatever is in the Five College record will appear from the record itself. They object to the will as irrelevant and immaterial to any issue presented by the special plea.

Mr. Sherman: Counsel for the complainants calls on counsel for the defendants to produce a letter, or press-copy of a letter, dated December 13th, 1890, addressed to Thomas G. Ritch and Morris B. Beardsley.

Mr. Bovee: Counsel for the defendants states that he is not prepared at this time to comply with the notice of counsel for the complainants, whether they can or will produce the papers called for.

Mr. Sherman: I read from the testimony of Thomas G. Ritch in the Five College record at page 672, at folio 2686.

Mr. Bovee: Counsel for the defendants objects to the reading from the record in the Amherst College case, which is already in evidence in this case, upon the ground that that record is the best evidence of what it contains.

Mr. Sherman: (reading):

"Q. At that time were you acquainted with Mor-
F. 299 "ris B. Beardsley spoken of here as Judge
"Beardsley?

"A. I was.

"Q. He lived at Bridgeport, Connecticut?

"A. He did.

"Q. Did you at the time know what relation he
"was to Mrs. Fayerweather?

"A. I knew that he was not a relative of Mrs.
"Fayerweather, but the husband of Mr.
"Fayerweather's niece.

"Q. I show you *a letter dated December 13th,*
"*1890*, and ask you if that letter is in
"your handwriting?

"Yes, sir.

F. 300 "Q. *Did you send that letter to Judge Beardsley*
"at or about the time of its date?

"A. I did."

I now read from folio 2688 the following letter:

Mr. Bovee: The same objection to this reading.

Mr. Sherman: (reading):

"'Private.'

"Arnoux, Ritch & Woodford,
"18 Wall Street,
"New York, December 13, 1890.

"Dear Judge: In kindness to Mrs. Fayerweather

"and Miss Joyce they ought in some way be in-
"formed of the existence in my possession of a
"prior will much less favorable to both of them
"than the present, and with no discretion what-
"ever to the executors—$800 per year to Miss J.
"and the income of $300,000 to Mrs. F. in addi-
"tion to real estate.

"Trust estate for life to the daughters of Wil-
"liam Fayerweather except $25,000 to Mrs. Beards-
"ley.

F. 301 "It is a delicate position for me, and so I put
"you in possession of this information with lib-
"erty to use it as you deem proper.

"Sincerely trusting Mrs. Fayerweather may
"soon see the hopelessness and unwisdom of a
"contest with those who desire to be her friends,

"I am very truly yours,

"Thomas Ritch.

Mr. Sherman: I offer in evidence *the will and four codicils* admitted to probate and the decrees admitting the will and codicils to probate which are respectively contained in the Five College record, as follows, the will at page 892 to 897; the first codicil from page 897 to page 898; the second codicil from page 898 to page
F. 302 899, the third codicil from page 899 to page 901; the fourth codicil from page 901 to page 902; also the decree admitting the will to probate contained at page 550 to page 553 of the record and the decree admitting the four codicils to probate as contained in the Five College record at page 554 to 559 inclusive. (See Exhibits 15, 16, 17, 18, 19, 40 and 41 in Appendix of Exhibits.)

Mr. Bovee: Counsel for the defendants object upon the ground that the record in the Five College case is already in evidence in this case and is the best evidence of what that contains. They object to the the testimony as irrelevant and immaterial to any issue presented by the special plea.

TESTIMONY OF F. B. MYRICK.

Mr. Sherman: Counsel for the complainants agrees with counsel for defendants that the adjudication which they have set up by plea is entirely disconnected from and without any relation to the validity of the will of 1884 and the four codicils and the decrees thereupon, and offers to stipulate to withdraw these papers if the counsel for the defendants and all of them will stipulate upon the record that said wills and codicils are wholly irrelevant to the judgment and not embraced within the judgment pleaded as a former adjudication. Coun-
F. 253 sel for complainants calls upon the counsel for the defendants to produce a letter dated Bridgeport, Connecticut, November 25th, 1890, from Morris B. Beardsley to the defendant Henry B. Vaughan.

Mr. Bovee: Counsel for defendants states that he is not prepared at this time to state whether the defendants will produce the letter called for or not.

Mr. Sherman: Counsel for complainants reads in evidence from page *498 of the record before the Surrogate* upon the contest which resulted in decree just read in evidence the letter in question, which is as follows:

Mr. Bovee: We object to it as irrelevant and immaterial to the issue presented by the special plea. *The record before the Surrogate is the best evidence* of
F. 254 what that contains.

Mr. Sherman: (reading):

"Bridgeport, Connecticut,
"November 25th, 1890.

"My dear Mr. Vaughan,

"I have received from Mr. Myrick, sent at "your request, the amount of tax and water rate. "I would be obliged if you would ask Mr. Myrick "to send me this additional information: Cost of "hay, grain, etc., used at stables, for repairs, etc. "to harnesses, carriages, etc., of pew at church, "of heat at house and stable, in short I want in-

"formation as will enable me to set down and "show Aunt Lou what her running expenses (ex- "clusive of table and servants and clothes) will "be apt to be. I am engaged in the effort to pur- "suade her that she is not left poor but has been "left sufficient to live as Uncle did.

"I enclose two bills which I suppose you "should have and which Aunt Lou handed me "yesterday while I was there.

"I have sent my wife's waiver to Mr. Ritch
F. 305 "and have sent the one for her two sisters to "them, and Aunt Lou promised to send her's yes- "terday and I think has done so. There is an ad- "verse influence from her family, but with Miss "Joyce's help I feel sure that it will not avail.

"Yours very truly,

"Morris B. Beardsley."

Mr. Bovee: I move to strike out the paper which has been read in evidence as not being read from any record which has been authenticated as a record of any court, but a paper which the counsel has produced from his own possesion and which may or may not have something to do with this case.

Mr. Sherman: Counsel for the complainants calls
F. 306 on counsel for defendants to produce a letter signed D. B. Fayerweather, dated September 23rd, 1884, to Thomas G. Ritch.

Mr. Bovee: Counsel for defendants states that they are not prepared at this time to say whether they can or cannot or will or will not produce the letter called for.

Mr. Sherman: Counsel for complainants reads from *page 307 of the Surrogates' record* the following letter:

Mr. Bovee: Counsel for the defendants objects to counsel for the complainants reading from a record or alleged record in the Surrogates' office, the paper from which he reads not having been identified as a record of

the Surrogates' Court; also upon the ground that the record in the Surrogates' Court is irrelevant and immaterial to the issues presented by the special plea herein.

Mr. Sherman: (reading):

"September 23rd, 1884."

Mr. Bovee: And we object as it is manifest that the counsel for the complainants is not reading from any record but from a paper memorandum which is upon the table before him.

Mr. Sherman: (reading):

F. 307 "September 23rd, 1884.

"Mr. Ritch.

"Dear sir, The names of my brother's daugh-
"ters are Mary W. Achter, wife of Henry B. Ach-
"ter, and Emma B. Drury, wife of Dudley Drury,
"of Muscatine, Iowa.

"You may make my wife's yearly allowance
"$15,000, instead of $12,000, and perhaps Mrs.
"Beardsley $100,000, instead of $50,000.

"Yours truly,

"D. B. Fayerweather.

"N. B. I presume this would go to her children
"in case of her death."

Counsel for complainants calls upon the counsel
F. 308 for the defendants to produce *a letter* dated *November 28th, 1890*, written to one Morris B. Beardsley from Thomas G. Ritch, a press-copy of it.

Mr. Bovee: Counsel for the defendants state that they are not prepared at this time to say whether they can or cannot or will or will not produce the letter called for.

Mr. Sherman: Counsel for complainants reads in evidence from *page 900* of the said *Surrogates'* record a letter as follows:

Mr. Bovee: Counsel for the defendants object to the letter and to the reading from the alleged Surrogates' record on the ground that that record is the best evidence

of what is therein contained, and there has no such record been put in evidence in this cause; and also object to the letter as irrelevant and immaterial to the issue presented by the special plea; and also upon the ground that the letter has not been properly authenticated and proved.

Mr. Sherman: (reading):

"New York, November 28th, 1890.

"Dear Judge,

F. 309 "I have not yet received the waivers from "Muscatine, but on Wednesday came a telegram "from H. B. Achter asking for a copy of the will "certified by the clerk of the court. I answered "that I could not get such a certificate until the "will was filed for probate, but that I had given "you a correct copy which I understood had been "sent to Iowa. I hope they will not act under bad "advice and cause delay by objections which could "have no other result than delay with the expense "and the loss of the $1,000 each legacy tax which "for myself I would be glad to make good to "them believing that it would be Mr. Fayer-"weather's wish in case they deal with us as

F. 310 "friends and not enemies. I fear that the will "will not be ready for probate on Monday, and as "I would not wish Mrs. Beardsley to come to the "City on an uncertainty I suggest that she wait "subject to a telegram from me.

"Yours truly,

Thomas G. Ritch.

"Hon. Morris Beardsley."

581 Q. Mr. Myrick, did you, on or about November 25th, 1890, at Mr. Vaughan's request, send to Morris B. Beardsley the amount of tax and water rate for the house 11 East 57th Street?

Mr. Bovee: Objected to as irrelevant and immaterial to the issue presented by the special plea.

A. I made up such a list. At whose request or to whom sent I do not know.

582 Q. Did you send Mr. Beardsley this additional information, cost of hay, grain, etc., used at stables, for repairs to harnesses, carriages, etc., a pew at church, of heat of house and stable, or any other information as to Mrs. Fayerweather's running expenses exclusive of table and servants and clothes?

F. 311 Mr. Bovee: Same objection.

A. I made up such a list.

583 Q. At Mr. Vaughan's request?

A. As to that I do not know, I do not remember.

584 Q. And did you send it to Mr. Beardsley?

A. That I do not remember, I think I gave it to Mrs. Fayerweather. That was running in my mind prior to the time you read the letter, I thought I gave it to her.

585 Q. Mr. Myrick, you spoke of an interview with Mr. Fayerweather in which he suggested that Mr. Vaughan should check off the securities in the safety deposit box with you?

A. Yes, sir.

F. 312 586 Q. Was that done?

Mr. Bovee: Objected to as irrelevant and immaterial to the issues presented by the special plea.

A. It was.

587 Q. When?

Mr. Bovee: Same objection.

A. At the deposit vault.

588 Q. When?

Mr. Bovee: Same objection.

A. I think it was Tuesday noon, in the afternoon.

589 Q. What date?

A. That is November 11th, 1890.

590 Q. Well, what was used as the basis for the checking, these books; the red book and the other book?

A. Yes, sir.

591 Q. Well, what process was adopted in that business?

Mr. Bovee: Same objection.

592 Q. Were all the securities taken out of the safe and called off by one and then checked by the other on the book?

Mr. Bovee: Same objection.

F. 313 A. I have not a definite opinion regarding the exact formula, whether I took them out and specified the exact number or he; I think that I did, that I specified the number there were there, and he found whether it was so on the book.

593 Q. That is you referred to the securities and he to the book?

A. That is as I tell you indefinite.

594 Q. That is your recollection?

A. They were checked, each item was called off and if he found it there it was checked.

595 Q. I mean who attended to the book and who to the examination of the securities?

A. At the moment I cannot tell you.

F. 314 596 Q. Had any of the other executors, either Mr. Bulkley or Mr. Vaughan, examined the contents of the safety deposit box before Mr. Fayerweather's death?

Mr. Bovee: Same objection.

A. No, sir.

597 Q. Were the contents of the safety deposit box then left in the same condition with the exception of taking out securities to the value of $175,155, until after the probate of the will?

A. Entirely so, with the exception that I told you of yesterday about taking notes out for collection.

598 Q. Those were Pingree and somebody's notes?

A. Yes, sir, whatever they were.

599 Q. You took the notes out that were falling due, did you?

A. That were falling due soon.

600 Q. And intermediate between the Friday when these securities were taken out and the delivery of the securities to the executors after the probate of the will, did you have the key of the vault?

Mr. Bovee: Same objection.

A. No, sir, I did not. I cannot remember whether

F. 315 I surrendered that key or not to the vault people.

601 Q. Do you mean Mrs. Fayerweather's key?

A. No, mine.

602 Q. No, but you got Mrs. Fayerweather's key after his death, didn't you?

A. Mr. Vaughan, that was for Mr. Vaughan.

603 Q. And that was the key used in getting out the notes that were falling due?

A. It was; I did not use my key.

604 Q. I want to know who had that key?

Mr. Bovee: The some objection to this testimony.

A. Mr. Vaughan.

605 Q. Yes, he had it down to——

A. As far as I know.

F. 316 Q. And continuously thereafter he had it?

Mr. Bovee: Same objection. If he knows?

A. I cannot tell you whether he had it thereafter, I know I secured it for him.

Mr. Bovee: You have answered the question, Mr. Myrick.

607 Q. You did not get it back again?

A. I do not know whether he had it continuously or not.

606 Q. Well, you did not get it back again?

A. No, sir.

609 Q. And what use he made of it in the meantime you do not know?

Mr. Bovee: Same objection.

A. I do not know.

610 Q. You have referred to Mr. Vaughan having some general duty in reference to this estate which naturally brought him in in some way in the application for the key to the safe deposit company. Do you remember just what was said on that question to Mrs. Fayerweather?

Mr. Bovee: We object to the question as assuming something that has not been proven, and we object to the testimony as irrelevant and immaterial to the
F. 317 issues presented by the special plea, and as irrelevant to any issue in the case at large.

A. Acting on the information that I received on the safety deposit vault I went to Mrs. Fayerweather for the key and told her whom it was to be used by——

611 Q. Well, whom did you say, Mr. Vaughan?

A. Mr. Vaughan, yes. And I made the remark that as Mr. Vaughan was an executor and would be called upon to act, I may have said soon, there was no objection to his having the key.

612 Q. I think you said that was on the Monday following Mr. Fayerweather's death?

A. No, you put the date in, I cannot tell whether it was Monday or Tuesday or when. Mr. Fayer-
F. 318 weather was buried Tuesday or Wednesday—does anybody know?

Mr. Blaikie: Wednesday.

Mr. Bovee: Do not ask any questions.

The Witness: I do not know what date.

613 Q. Was it before or after Mr. Fayerweather's burial?

A. I cannot now tell.

614 Q. Well, what is your best recollection?

A. Well, I wont attempt to put a date to it, I know I went there for that purpose and I remember that I got the key.

615 Q. Because of the imminent necessity of putting maturing notes in process of collection?

Mr. Bovee: We object to the testimony as incompetent, and to the question as irrelevant and immaterial to the issue presented by the special plea.

A. That is my remembrance, that there was something to be done.

616 Q. And did you make this suggestion to Mr. Vaughan, that there were notes there falling due, or did he make that suggestion to you?

F. 319 Mr. Bovee: Same objection.

A. My remembrance is I told him: I was conversant with the business and he was not.

617 Q. Well, is it your recollection that you told him so immediately after Mr. Fayerweather's death when you next saw him?

A. That must be attached to the other. I cannot tell when.

618 Q. What is your best recollection about it?

Mr. Bovee: Same objection.

A. I have no recollection by which I can definitely state the date; if I had my books before me I might possibly give you an impression.

619 Q. Well, you had under your practical direc-

F. 320 tion a very large estate involving negotiable paper, and your attention to that did not cease because Mr. Fayerweather died?

A. No, sir.

620 Q. Did you see Mr. Vaughan on the Monday?

A. What Monday?

621 Q. Following Mr. Fayerweather's death?

A. I do not know.

522 Q. Did you see him on the Sunday following Mr. Fayerweather's death?

A. I did.

623 Q. Did you speak with him about business then?

A. No, sir. I have no remembrance of it at least.

624 Q. Well, do you remember whether, when you saw Mrs. Fayerweather to get that key, Mr. Fayerweather's remains were still in the house?

Mr. Bovee: I object to the question as incompetent, and I object to the testimony as irrelevant and immaterial to the issue presented by the special plea.

A. I do not.

625 Q. Well, was this suggestion that you should get the key one that you received only from Mr. Vaughan or did the other executors unite with him in request-

F. 321 ing you to get the key?

Mr. Bovee: Same objection.

A. I do not think that I have testified that the suggestion came from Mr. Vaughan; I think it was mine.

626 Q. Do you mean to be understood that it came from you?

A. I think it was mine consequent upon my knowing that there was business to be attended to.

627 Q. And you made it known only to Mr. Vaughan and not to the other executors?

A. I have no remembrance of speaking with the other executors.

626 Q. The securities in that box were taking possession of by all the executors before the appraisal by the Surrogate's appraisers, were they not?

F. 322 Mr. Bovee: Same objection.

A. Your question is too indefinite to answer. Do you mean taking physical possession of it?

629 Q. Well, assumed control of it.

A. I cannot give you the date when they took possession.

630 Q. No, but was it before the Surrogate's appraisers appraised the property?

Mr. Bovee: We object to the question as calling for the conclusion of the witness, and to the testimony as irrelevant and immaterial to the issues presented by the special plea.

A. It was.

631 Q. Do you remember how long before the appraisers started in to appraise the property?

Mr. Bovee: Same objection, as irrelevant and immaterial to any possible issue in the whole case.

A. I could not define the time.

632 Q. Well, was it a week or two weeks or a month or more.

A. I cannot say the time. I know time did elapse,

F. 323 it would be a guess work at a month or more.

633 Q. Is it your best impression that it was a month or more?

A. I think it was over a month.

634 Q. When did your employment by the executors begin?

Mr. Bovee: Same objection.

A. It was either the 27th of January or the 27th of February.

635 Q. 1891?

A. I think the 27th of February, 1891.

636 Q. By whom were you then employed?

Mr. Bovee: Same objection.

A. Mr. Bulkley.

F. 324 637 Q. You really had been working for the executors before then, had you not?

A. No, sir.

638 Q. What was the first thing you did when you began working for them?

Mr. Bovee: Same objection.

A. My remembrance is that I commenced and copied a list that Mr. Bulkley had made up of receipts by him.

639 Q. Did you prepare the draft of the inventory filed by the executors?

A. I did.

Sworn to before me, Jan. 24th, 1901,

JOHN A. SHIELDS,
Examiner.

F. B. MYRICK.

Adjourned to Friday, January 18th, 1901, at 10:30 A. M.

F. 325

F. 326

FAYERWEATHER
vs.
RITCH.

REYNOLDS
vs.
RITCH.

F. 327

COMPLAINANTS' TESTIMONY.

NEW YORK, January 18th, 1901.

F. 328 Met pursuant to adjournment. Present: The Examiner, Mr. Sherman, Mr. Blaikie, Mr. Bovee, Mr. Fain, Mr. McLoughlin, a representative of Butler, Notman, Joline & Mynderse; a representive of Nash & Jones.

THOMAS M. MARSAC, called as a witness on behalf of the complainants, being duly sworn, testified as follows:

Direct examination by Mr. Sherman:

1 Q. Mr. Marsac, you are employed in the office of the Surrogate of the County of New York, are you not?
A. Yes, sir.

2 Q. And you have brought here, have you, some of the official files from that office under subpœna?

A. Yes, sir.

3. Have you among other things brought here the petition for probate of the will of Daniel B. Fayerweather?

A. Yes, sir, (producing paper).

Mr. Sherman: I read in evidence the petition produced by the witness of Justus L. Bulkley, Thomas G. Ritch and H. B. Vaughan, which is as follows:

Mr. Bovee: Counsel for defendants objects upon
F. 329 the ground that the question and subject are, quoting from the language of complainants' counsel at page 71 of defendants' proof, "Entirely outside and unrelated to any question presented by the pleas as to the existence or effect or validity of the adjudication by the Five Colleges' action;" and that the principle as also claimed by counsel for the complainants, upon which the examination is to be conducted is, that the testimony is to be limited to evidence which is related to that subject. Counsel for defendants claim that this is not related to
the subject and that counsel for the complainants
F. 330 has no right to pursue the inquiry or to introduce this testimony unless upon his professional insistence that the subject does relate to the estoppel created by the special plea. If the question is pressed it will be understood that counsel does make that insistence.

Counsel for defendants further tender the stipulation which they have heretofore offered in respect to irrelevant and immaterial matter, and that the taking of the testimony shall be strictly limited to the issues raised by the special plea.

Mr. Sherman: Counsel for the complainants protests against the oppressive course pursued by the counsel for the defendants in placing at large upon the record, between each question or tender of evidence and the answer or the evidence, a long argumentative and unsound expo-

sition of their conception of the legal effect of what the counsel for the complainants does in the preparation of the case. Now Mr. Bovee as a matter of physical convenience to the stenographer, shall I read this to him or may he copy it at his pleasure?

Mr. Bovee: Just as you please. I have no objection to make to that course.

Mr. Sherman: I have no object in making the suggestion except to save him the physical labor as far as possible.

F. 331 Mr. Bovee: I do not suppose you can mark the official record from the Surrogates' office.

Mr. Sherman: (reading):

[See Exhibit 41a in the Appendix of Exhibits.]

4 Q. Mr. Marsac, how long have you been in the Surrogates' office?

A. About nineteen years.

5 Q. And are you familiar with the general forms of papers there?

A. Well, in a way, yes.

6 Q. I see here annexed to the petition which has just been read in evidence a blank form of affidavit marked "Form F," and that several of them are appended to this petition purporting to be verified by various de-

F. 332 ponents; and that there is also another form described as "Form M." Are those blanks printed and furnished by the Surrogates' office?

Mr. Bovee: One moment. I object to the question as incompetent, irrelevant and immaterial, and irrelevant to any issue presented by the special plea.

A. Yes, sir.

7 Q. And those blanks are customarily filled out and filed with the petition, are they?

Mr. Bovee: I object to the question as incompetent, irrelevant and immaterial as to what the custom and practice of the Surrogates' Court is, and to the question and subject as irrelevant and immaterial to the issue raised by the special plea.

A. Yes, sir.

Mr. Sherman: I offer in evidence the petition of Thomas G. Ritch produced by the witness and accompanying the petition of the three just read in evidence.

Mr. Bovee: Counsel for the defendants objects
F. 333 upon the ground that the question and subject matter are, quoting from the language of complainant's counsel at page 71 of the defendants' proofs, "entirely outside and unrelated to any question presented by the pleas as to the effect or validity of the adjudication of the Five College action."

Mr. Sherman: (reading):

"Surrogate's Court,

"County of New York.

"In the matter of proving the last
"will and testament
F. 334 "of
"Daniel B. Fayerweather,
"Deceased,
"as a will of real and personal property.

"To the Surrogates' Court of the County of New
"York.

"Thomas G. Ritch, being duly sworn, says: that
"he is one of the petitioners herein; that the fol-
"lowing list, which said affiant makes a part of
"this affidavit and of said Petition for Probate, is
"a full and correct list of the names and residences

"of all the persons and bodies who are in any way
"entitled to any legacy, devise, interest, or estate
"under or by virtue of the will of said deceased,
"or from said decedent; together with the rela-
"tionship or otherwise of such persons to said de-
"cedent; and the nature, value and amount of
"such legacy, devise, interest, or estate; to the
"best of deponent's knowledge, information and
"belief.

F. 335

"Sworn to before me, this
"10th day of December, 1890.
"Edw'd Marshal Grout,
Notary Public.

Thomas G. Ritch,
Petitioner.

"List referred to above.

"Name of legatee, Relationship, Residence.
"Lucy Fayerweather, widow, 11 E. 57th St.
"Cash $10,000, Nature of
"house 11 E. such legacy, Value
"57th St. and devise, int-
"contents, unascertained erest or es-
F. 336 "stable 145 E. tate.
"57th St. and
"contents.
"Executors, in trust, sum sufficient to
"produce per annum $ 15,000
"Lucy Fayerweather, widow, income on
"above sum
"Anna A. Joyce, sister-in-law, annuity, 4,000
"Lucy J. Beardsley, niece, Bridgeport,
"Conn., Cash, 100 000
"Mary Achter, niece, Muscatine, Iowa,
"Cash, 20,000
"Emma S. Fayerweather, formerly Drury,
"niece, Muscatine, Iowa, Cash 20,000

"Charles Hennessy, relationship, none,
"dead, Cash, $ 1,000
"Presbyterian Hospital, N. Y. City,
"Cash, 25,000
"St. Luke's Hospital, N. Y. City, Cash, 25,000
"Manhattan Eye and Ear Infirmary, N.
"Y. City, Cash, 25,000
"Woman's Hospital, N. Y. City, Cash, 10,000
"Mount Sinai Hospital, N. Y. City,
F. 337 "Cash, 10,000
"Bowdoin College, Brunswick, Maine,
"Cash, 100,000
"Dartmouth College, Hanover, N. H.,
"Cash, 100,000
"Williams College, Williamstown, Mass.,
"Cash, 100,000
"Amherst College, Amherst, Mass., Cash, 100,000
"Wesleyan University, Middletown,
"Conn., Cash, 100,000
"Yale College, New Haven, Conn., Cash, 100,000
"Columbia College, N. Y. City, Cash, 200,000
"Union Theological Seminary, N. Y.,
F. 338 "City, Cash, 50,000
"Hamilton College, Clinton, N. Y., Cash, 100,000
"Rochester University, Rochester, N.Y.,
"Cash, 100,000
"Cornell University, Ithaca, N. Y., Cash, 200,000
"Lafayette College, Easton, Pa., Cash, 50,000
"Lincoln University, Lower Oxford, Pa., 100,000
"University of Virginia, Charlottesville,
"Va., Cash, 100,000
"Hampton University, Hampton, Va.,
"Cash, 100,000
"Maryville College, Maryville, Tenn.,
"Cash, 100,000
"Marietta College, Marietta, Ohio, Cash, 50,000
"Adelbert College, Cleveland, Ohio, Cash, 50,000

"Wabash College, Crawfordsville, Ind.,
"Cash, $ 50,000
"Park College, Parkville, Mo., Cash, 50,000

"The executors are authorized, in their
"discretion to withhold or reduce any of
"the bequests to the foregoing educa-
"tional institutions:

"Name, Relationship, Residence, Nature, &c.
"Value:

F. 339 "Frank B. Myrick, relationship, none,
"N. Y. City, Cash, 10,000
"Charles Baker, relationship, none, N.
"Y. City, Cash, 5,000
"Henry Baker, relationship, none, N. Y.
"City, Cash, 5,000
"Executors, to expend for cemetery lot,
"&c., 5,000
"E. H. Hertzman, dead, Cash, 5,000
"Frank H. Sellman, relationship, none,
"N. Y. City, Cash, 3,000
"Wife of Geo. L. Miller, relationship,
"none, N. Y. City, Cash, 2,000

F. 340

"The following legacies are to servants of
"the testator, and are payable only to
"those in his employ at the time of
"his death, and deponent cannot now
"state who of them were so employed at
"such time:

"Benj. Dietz, no relation, N. Y. City,
"Cash, 100
"Mary J. Quinn, no relation, N. Y. City,
"Cash, 300
"Kate Quinn, no relation, N. Y. City,

"Cash, $ 100
"Patrick Keefe, no relation, N. Y. City,
"Cash, 300
"Thomas Donahue, no relation, N. Y.
"City, 300
"Owen Keefe, no relation, N. Y. City,
"Cash, 100

"The residue of the estate, the value of
F. 341 "which is unascertained, is given to Jus-
"tustus L. Bulkley, of N. Y. City,
"Thomas G. Ritch, of Stamford, Conn.,
"and Henry B. Vaughan, of Orange, N.
"J., none of whom are related to the
"testator.

"Thomas G. Ritch."

Mr. Sherman: Counsel for the complainants also offers in evidence the objections filed by Coudert Brothers to the probate of the will of Daniel B. Fayerweather and its codicils respectively December 15th and 17th, 1890, and the objections filed by Daniel G. Rollins as coun-
F. 342 sel, January 21st, 1891, and the additional objections filed by him March 29th, 1891.

Mr. Bovee: Objected to as irrelevant and immaterial to any issue presented by the special plea.

Mr. Sherman: (reading):

"Surrogate's Court,

"County of New York.

In the matter of the probate of the alleged will and codicils of DANIEL B. FAYERWEATHER, *deceased.*

F. 343

"Lucy Fayerweather, widow of Daniel B. Fayerweather, deceased, appearing in this proceeding by Coudert Brothers, her attorneys, objects to the probate of the paper writing dated October 6th, 1884, propounded as the last Will and Testament of Daniel B. Fayerweather, deceased, and also to the probate of the several paper writings dated respectively December 13th, 1884, January 7th, 1888, March 19th, 1889, and November 15th, 1890, propounded as codicils thereto and alleges as follows:

F. 344

"I. That the said paper writings propounded as aforesaid, taken together do not constitute the last Will and Testament of Daniel B. Fayerweather, deceased, and that they do not constitute the whole thereof, and that they are not the testamentary acts, nor is either of them a testamentary act, of said Daniel B. Fayerweather, deceased.

"II. That the said paper writings propounded as aforesaid were not, nor was either of them freely or voluntarily made or executed by the said Daniel B. Fayerweather as his last Will and Testament and codicils.

"III. That the subscription and publication of said paper writings and each of them so propounded as aforesaid—if the same were ever subscribed or published—were procured and the execution thereof—if the same were ever executed—was procured, by wrongful and undue influence, practiced or exerted upon the said deceased.

"IV. That at the time of the execution of the said paper writings, if the same were ever exe-
F. 345 cuted, the said Daniel B. Fayerweather was not of sound and disposing mind, memory and understanding but was greatly enfeebled both in body and mind and was not competent to make a will.

"V. That the said paper writings so propounded as aforesaid were not subscribed, published or declared in due form by the said Daniel B. Fayerweather as his last Will and Testament and codicils in conformity with the statutes in such case made and provided nor was either of them so subscribed, published or declared.

"*WHEREFORE* the said Lucy Fayerweather
F. 346 objects to the probate of the said paper writings so propounded as aforesaid and prays for a decree that the probate thereof and of each and all of them be denied and that they and each of them be decreed to be null and void and of no force or effect as testamentary acts of said Daniel B. Fayerweather, deceased.

Dated, New York, December 15th, 1890.

Lucy Fayerweather.

Coudert Brothers,
Attys. for contestant."

"City and County of New York, *ss.*

"Lucy Fayerweather, being duly sworn, deposes and says: that she has read the foregoing objections subscribed by her and believes the same to be true.

Lucy Fayerweather.

"Sworn to before me this 15th day of December 1890.

F. 347

Robert J. Smack,
Notary Public, Kings County.

[SEAL] Certif. filed in N. Y. Co."

F. 348

TESTIMONY OF T. M. MARSAC.

"SURROGATE'S OFFICE,
"County of New York.

In the matter of the probate of the alleged will and codicils of
DANIEL B. FAYERWEATHER,
F. 349 *deceased.*

"Lucy Fayerweather, widow of Daniel B. Fayerweather, deceased, appearing in this proceeding by Coudert Brothers, her attorneys, objects to the probate of the paper writing dated October 6th, 1884, propounded as the last Will and Testament of Daniel B. Fayerweather, deceased, and also to the probate of the several paper writings dated respectively December 13th, 1884, Jan-
F. 350 uary 7th, 1888, March 19th, 1889, and November 15th, 1890, propounded as codicils thereto and alleges as follows on information and belief:

"I. That the said paper writings propounded as aforesaid, taken together do not constitute the last Will and Testament of Daniel B. Fayerweather, deceased, and that they do not constitute the whole thereof, and that they are not the testamentary acts, nor is either of them a testamentary act, of said Daniel B. Fayerweather, deceased.

"II. That the said paper writings propounded

as aforesaid were not, nor was either of them freely or voluntarily made or executed by the said Daniel B. Fayerweather as his last Will and Testament and codicils.

"III. That the subscription and publication of said paper writings and each of them so propounded as aforesaid—if the same were ever subscribed or published—were procured and the execution thereof—if the same were ever executed—was procured by wrongful and undue influence, practiced or ex-
F. 351 erted upon the said deceased.

"IV. That at the time of the execution of the said paper writings, if the same were ever executed, the said Daniel B. Fayerweather was not of sound and disposing mind, memory and understanding but was greatly enfeebled both in body and mind and was not competent to make a will.

"V. That the said paper writings so propounded as aforesaid were not subscribed, published or declared in due form by the said Daniel B. Fayerweather as his last Will and Testament and codicils in conformity with the statutes in such case made and provided nor was either of them so
F. 352 subscribed, published and declared.

"*WHEREFORE* the said Lucy Fayerweather objects to the probate of the said paper writings so propounded as aforesaid and prays for a decree that the probate thereof and of each and all of them be denied and that they and each of them be decreed to be null and void and of no force or effect as testamentary acts of said Daniel B. Fayerweather, deceased.

Dated, New York, December 17th, 1890.

Coudert Brothers, Lucy Fayerweather.
Attorneys for Contestant."

"City and County for New York, *ss*:

"Lucy Fayerweather, the contestant above named, being duly sworn, deposes and says, that she has read the foregoing objections subscribed by her and knows the contents thereof, that the same are true to her own knowledge except as to the matters therein stated to be alleged on information and belief and that as to those matters she believes them to be true.

Lucy Fayerweather.

F. 353

"Sworn to before me this 17th day of December, 1890.

Rob. J. Smack,
Notary Public, Kings Co.
Certifi. filed in N. Y. Co."

[SEAL.]

F. 354

"NEW YORK SURROGATES' COURT.

In the matter of the probate of the alleged will and codicils of
DANIEL B. FAYERWEATHER,
deceased.

F. 355

"Lucy J. Beardsley and Emma S. Fayerweather, two of the heirs at law and next of kin of the said Daniel B. Fayerweather, deceased, having heretofore, by order of the Surrogate entered herein on the 20th day of February, 1891, been granted leave to withdraw the waivers and consents heretofore executed by them, do hereby withdraw the same, and, appearing in this proceeding by Daniel G. Rollins, their attorney, object to the probate of the several paper writings dated respectively December 13th, 1884, January 7th, 1880, March 19th, 1889, and November 15th, 1890, propounded
F. 356 as codicils to the last Will and Testament of the said Daniel B. Fayerweather, and alleges as follows, on information and belief:

"*FIRST*: That the said paper writings propounded as aforesaid, taken together with the paper writing dated October 6th, 1884, propounded as the last Will and Testament of the said Daniel B. Fayerweather, deceased, to which such papers of later date are in form *codicillam*, do not constitute the last Will and Testament of the said Daniel B. Fayerweather, deceased, and that they are not the testamentary acts, nor is either of them a testa-

mentary act of said Daniel B. Fayerweather, deceased.

"*SECOND*: That the said paper writings propounded as codicils as aforesaid were not, nor was either of them freely or voluntarily made or executed by the said Daniel B. Fayerweather, deceased, as codicils to his last Will and Testament.

"*THIRD*: That the subscription and publi-
F.357 cation of said paper writings and each of them so propounded as codicils as aforesaid, if the same were ever subscribed or published, were procured and the execution thereof, if the same ever were executed, was procured by undue influence practised or exerted upon the said decedent.

"*WHEREFORE*, the said Lucy J. Beardsley and Emma S. Fayerweather object to the probate of the said paper writings so propounded as codicils as aforesaid, and pray for a decree that the probate thereof and of each and all of them be denied, and that they and each of them be decreed to
F. 358 be null and void and of no force or effect as testamentary acts of the said Daniel B. Fayerweather, deceased.

Lucy J. Beardsley,
Emma S. Fayerweather.

Dated, Bridgeport, Conn., January 21st, 1891.

Dan'l G. Rollins,
Attorney for Contestants."

"Lucy J. Beardsley and Emma S. Fayerweather, two of the contestants above named, be-

ing duly sworn, depose and say, that they have read the foregoing objections subscribed by them and know the contents thereof; that the same are true to their own knowledge except as to the matters therein stated to be alleged on information and belief, and that as to those matters they believe them to be true.

Lucy J. Beardsley,
Emma S. Fayerweather.

F. 359

Sworn to before me this 21st day of January 1891.
Fred W. Tracy,
Notary Public for the State of Connecticut."

[SEAL.]

F. 360

"State of Connecticut,
County of Fairfield,
County Clerk's Office.

"I, Samuel B. Sumner, Clerk of said County, and of the Superior Court in and for said County, the same being a Court of Record, hereby certify, that Fred W. Tracy was at the date of the certificate of proof, or acknowledgement of the amended instrument, a Notary Public, within and for said County, duly appointed, commissioned and sworn, and authorized by the laws of said State, to administer oaths, and take the acknowledgements of deeds and other instruments and to certify the same;

that I am well acquainted with his handwriting, and verily believe that the signature to the instrument hereto annexed is genuine; and that said instrument is executed and acknowledged in conformity with the laws of this State.

"*IN TESTIMONY WHEREOF*, I have hereunto set my hand and affixed the seal of said Court, at Bridgeport, in said County and State, on the 21st day of January, 1891.

F. 361

Samuel B. Sumner, Clerk."

]SEAL]

F. 362

TESTIMONY OF T. M. MARSAC.

"N. Y. SURROGATE'S COURT.

In the matter of the probate of the alleged will and codicils of
DANIEL B. FAYERWEATHER,
deceased.

F. 363

"Lucy J. Beardsley, one of the heirs at law and next of kin of the said Daniel B. Fayerweather, deceased, having heretofore by leave of the Court on or about the day of January, 1891, filed objections to the probate of certain paper writings herein propounded as codicils to the last Will and Testament of the said Daniel B. Fayerweather now, not withdrawing said objections heretofore filed but insisting upon the same by consent of the Court she interposes the further specific objections which follow and alleges on information and belief:

F. 364

"*FIRST*: That the paper writing dated December 13th, 1884, and propounded as a codicil to said last Will and Testament was not freely or voluntarily made or executed by the said Daniel B. Fayerweather, deceased, but that the subscription and publication of said paper writing, if the same was ever subscribed or published was procured, and the execution thereof if the same was ever executed was procured by undue influence practised upon the said decedent by Thomas G. Ritch.

"*SECOND*: That the paper writing dated November 15th, 1890, and propounded as a codicil

for the last Will and Testament of the said Daniel B. Fayerweather, deceased, was not freely or voluntarily made or executed by the said Daniel B. Fayerweather, deceased, but that the subscription and publication of said paper writing, if the same was ever subscribed or published, was procured and the execution thereof if the same was ever executed, was procured by undue influence practised or exerted upon the said decedent by Thomas G. Ritch and Henry B. Vaughan.

F. 365 "*WHEREFORE* the said Lucy J. Beardsley as heretofore objects to the probate of the said paper writings so propounded as codicils as aforesaid and prays for a decree that the probate thereof and of each of them be denied and that they and each of them be decreed to be null and void and of no force or effect as testamentary acts of the said Daniel B. Fayerweather, deceased.

Lucy J. Beardsley.

F. 366 Subscribed sworn to before me at the City of Bridgeport, Conn., this 17th day of Feb. A. D., 1891.
Fred W. Tracy,
Notary Public for the State of Connecticut."

[SEAL]

"State of Connecticut,
County of Fairfield,
County Clerk's Office.

"Samuel B. Sumner, Clerk of said County, and of the Superior Court, in and for said County, the same being a Court of Record, hereby certify,

That Fred W. Tracy, Esq., was at the date of the certificate of proof, or acknowledgement of the annexed instrument, a Notary Public, within and for said County, duly appointed, commissioned and sworn, and authorized by the laws of said State, to administer oaths, and take the acknowledgement of deeds and other instruments and to certify the same; that I am well acquainted with his handwriting, and verily believe that the
F. 367 signature to the instrument hereto annexed, is genuine; aud that said instrument is executed and acknowledged in conformity with the laws of this State.

"*IN WITNESS WHEREOF*, I have hereunto set my hand and affixed the seal of said Court, at Bridgeport, in said County and State, on the 19th day of February, 1891.

Samuel B. Sumner, Clerk."

[SEAL]

8 Q. Have you produced the testimony taken upon the special proceeding under these objections to
F. 368 thau proceeding for probate of the will and codicils?

A. (Producing book). Yes, this is the testimony.

9 Q. Is there testimony in that record of Edward M. Grout? Look at page 69, please.

Mr. Bovee: We object to the question as incompetent, irrelevant and immaterial to any issue presented by the special plea. The record itself is the best evidence of what it contains.

A. Yes, pages 278, 303 and 384 of this book.

Mr. Sherman: Counsel for the complainants reads in evidence from the deposition of Edward Marshal Grout, in said proceedings as follows:

Mr. Bovee: I ask counsel from what page he reads.

Mr. Sherman: Have you a copy of the printed book?

Mr. Bovee: Not here, but I have at my office.

Mr. Sherman: Shall I give you the page in the printed book or in the Surrogates' Minutes?

Mr. Bovee: The printed book, if you please.

Mr. Sherman: Page 499 of the printed record.

Mr. Bovee: In the Surrogates' Court?

Mr. Sherman: Yes, the one which you furnished the counsel.

F. 369 Mr. Bovee: It is the same thing, I suppose.

Mr. Sherman: It has Judge Arnoux's memorandum on it. For convenience of counsel the reference to pages is to the printed record furnished to the various counsel in the Surrogate's Court.

Mr. Bovee: Counsel for the defendants objects to the testimony and to the reading thereof upon the ground that the question and the subject are irrelevant and immaterial to the issue presented by the special plea and entirely outside and unrelated to any question presented by the pleas as to the existence or effect or validity of the adjudication by the Five College Action.

Mr. Sherman: Counsel for the complainants states
F. 370 that this evidence is given at a time in the taking of proofs when it has become apparent from the evidence adduced in support of the plea by the defendants that the plea, so far especially as it relates to the matters set up in the cross-bill, is not true in fact, and that in point of fact no such adjudication was made in the Five College Action or attempted to be made as is set up by the plea to the cross-bill.

Counsel for complainants further insists that the defendants, by going into evidence at large, have overruled their pleas and that the complainants are now at liberty, if they were not before at liberty, to go into evidence at large in the cause. I read from page 499 of the deposition—

Mr. Bovee: Defendants' counsel understands that the testimony as read is the testimony from the official record produced by the witness.

Mr. Sherman: Yes.

Mr. Bovee: And that if there are any errors or corrections in the testimony as read, not corresponding with the actual testimony of the record, they are to be corrected.

Mr. Sherman: Certainly. (reading):

F. 371

(Here follows deposition of Edward M. Grout, for which see Surrogate's Record, beginning at page 499, folio 1496).

Mr. Sherman: I read from the same record from the testimony of Stewart L. Woodford, a witness produced in support of the proponents.

Mr. Bovee: We object to this as irrelevant, and immaterial to the issue presented by the special pleas, and entirely outside and unrelated to any question pre-
F. 372 sented by the pleas and to the existence or effect or validity of the adjudication in the Five College action, the case of Amherst against Ritch.

Mr. Sherman: Page 100, folio 300: "I drew the last or fourth codicil."

Mr. Bovee: Can't you indicate to me where you are reading from the official record?

Mr. Blaikie: Six pages after the cross examination begins, therefore it is a part of the cross examination.

Mr. Sherman: This is from the cross examination of Mr. Stewart L. Woodford by Daniel G. Rollins. I will begin at folio 299 (reading):

(Here follows deposition of Stewart L. Woodford for which see Surrogate's Record, Page 100—folio 299.

Mr. Bovee: I would suggest that we take a recess now, and at two o'clock I will have my copy of the printed record here and then I can follow you through and see what you tender.

Mr. Sherman: That is agreeable.

Mr. Bovee: You will go on reading from this record this afternoon?

F. 373 Mr. Sherman: Yes.

Mr. Bovee: If there is any other book I would like to know it so that I can have it here.

Mr. Sherman: Do you want Mr. Marsac here, or are you willing that he should go?

Mr. Bovee: He had better wait here, there may be some question of the accuracy of these papers that may arise.

At this point a recess was taken until 2 P. M.

AFTER RECESS.

Mr. Sherman: When the adjournment is taken to-day I Make application that it be to to-morrow morning at 10:30.

F. 374 Mr. Bovee: And I object to that on the ground of other engagements. I have to be in the Appelate Division on Monday.

Mr. Sherman: The Appelate Division does not sit to-morrow, does it?

Mr. Bovee: I understand it does not sit tomorrow, but I have got to get ready for that argument. I have given all the time I can this week to this case, and I ask the Examiner to postpone the hearing until Tuesday.

The Examiner: Suppose we go on to-morrow morning from half past ten to twelve, and then I will adjourn to Tuesday to help you out.

Mr. Bovee: This is the 18th of January and there are twelve days for the complainants to complete the taking of their proofs, and I do not think that counsel should be called upon to devote Saturdays and Sundays—because that is what it means.

Mr. Sherman: We have not asked for any Sundays.

The Examiner: What is the objection to going on as I say to-morrow morning and then again on Tuesday.

Mr. Bovee: My engagements are such that it would be a very serious embarrassment to me to have to
F. 375 take the day to-morrow.

Mr. Sherman: There are twenty sets of attorneys here; why not go on with some other attorney?

The Examiner: I will make the adjournment to to-morrow at half past ten to go on until twelve and then we will adjourn to Tuesday.

Mr. Sherman: Counsel for complainants offers in evidence and reads in evidence the testimony of Henry B. Vanghan as it appears in the Five college record introduced in evidence by the defendants.

Mr. Bovee: I think this is premature. You have read from the testimony of Mr. Grout from the probate record and have not completed it.

Mr. Sherman: I am reading as much of the pro-
F. 376 bate record as it seems to me useful, convenient or necessary.

Mr. Bovee: I desire to read all you have not read of the testimony of Mr. Grout.

Mr. Sherman: Well, do you want to do that now?

Mr. Bovee: I think it should go in at this time.

Mr. Sherman: I am perfectly content to have it taken into the minutes without putting you to the physical necessity of reading it to the stenographer. I will stipulate that, subject to all objections that you may desire to make, those depositions shall go in as they are printed.

Mr. Bovee: The parts that you have not read I propose to read into the record.

Mr. Sherman: Mr. Examiner, I am engaged now in offering in evidence the testimony taken in the Surrogate's Court upon which this will and these codicils were admitted to probate. Mr. Bovee seems to think that that is precisely as if I had the witnesses on the stand and that I must let him cross examine them before I go on to the next one, but that is not the true fact, I am reading myself as part of my case a record and when I get through with that record I suppose he may put in any part of it that I omitted that he wants in, that I agree to,
F. 377 but not that we are to zig-zag back and forth between every page. I am entitled, it seems to me, to have this offer of proof treated as one thing until I get through, and then he can read the part of the record which he desires.

The Examiner: I suppose under the practice here the witness is with you to that extent.

Mr. Sherman: Mr. Marsac is sitting here identifying these various parts of this record, and in connection with his testimony technically I am reading this record. Now as I understand it he does not cross examine Mr. Marsac on every feature of his testimony, but he waits until I get through with him and then he may cross examine.

F. 378 Mr. Bovee: This is the situation, Mr. Examiner; the record has been produced and counsel for the complainants reads from that record excerpts of the testimony of a witness, given before the Surrogate on the probate of the will. He has finished, having read only such parts as he desired to read, and he has concluded so far as he is concerned the examination of that witness, and he proposes now to proceed with the reading of the testimony of another witness. I say no, I propose now to read into the record what he has left unread of the testimony of that witness. That is my proposition.

Mr. Sherman: But the witness is not here. The witness is not Mr. Grout. If I were examining Mr. Grout,

before I stopped why of course he would be entitled to cross examine Mr. Grout before I took up any other witness, but that is a very ingenious and erroneous theory as to what I am doing. The witness is not Mr. Grout, it is Mr. Marsac. We have a right to read in evidence continuously that part of the record which Mr. Marsac has identified, and then I concede that Mr. Bovee is entitled to read any part of the record that he pleases; but to have him interrupt me because he thinks I am through with Mr. Grout when the proposition is that I am not
F. 379 through with the record that I am putting in with this witness, is entirely erroneous, I submit.

Mr. Bovee: It is perfectly clear that it is the testimony of Mr. Grout which is being introduced into this case, a witness to the will who was examined and cross examined; it is the testimony of Grout which is being incorporated here and which they are reading from that official record. The only reason why they have a right to do it is because it is a record of the proceedings in the Surrogate's Court. They have read part of it; they read one page and the other page on the other side they have not read. I say this is the time and this is the place to complete the record of that testimony by reading the rest of the testimony which the complainant's
F. 380 counsel has failed to read, instead of the defendants being left to read that into this record four or five days hence.

Mr. Sherman: We are not asking any favors of Mr. Bovee, we are here introducing through the medium of one witness, one Marsac, what he is prepared to testify to and identify and make part of his testimony. When we get through with Marsac in chief, they can take up the cross examination and put in anything else.

The Examiner: I think so.

Mr. Bovee: I do not think so. Mr. Marsac is going to sit there for a week, we will say, and is not asked a question, not a word, and then the counsel for the complainants

reads from there and then skips over some where else, reads somewhere else, and there we are. Now in the regular order of procedure the testimony of the witness should be completed.

Mr. Sherman: What witness? The witness is Marsac.

Mr. Bovee: The witness whose testimony you are reading.

Mr. Sherman: Marsac is only a pretense, he has given no testimony.

The Examiner: He has identified the record.

F. 381 Mr. Bovee: That is it, but Mr. Grout is the witness whose testimony is now being incorporated into this record.

Mr. Sherman: He cannot take my witness Marsac up until I get through with him.

The Examiner: You may put your proof in in any way you see fit.

Mr. Bovee: I do not know that an exception is of any avail, but I will take an exception to your ruling.

The defendants' counsel objects to the taking of any further testimony until the reading of the testimony of Mr. Grout from the record of the Surrogates' Court produced by the witness Marsac has been completed, and defendants' counsel insists upon his right to read

F. 382 the testimony of Mr. Grout which has been omitted by the counsel for the complainants, so that the entire testimony given by the witness Grout and contained in the record read from will be in the record here.

And defendants' counsel objects to complainants' counsel reading excerpts or paragraphs of the testimony of any one witness, including the witness Grout, without introducing the whole of the testimony of that witness contained in that record.

Mr. Sherman: Counsel for complainants concedes the right of counsel for the defendants, at the conclusion of the examination in chief of the witness Marsac now on the stand, to introduce from the records produced by him

any part thereof which counsel for defendants think relevant or material or choose to offer, but insists that he shall be permitted to conclude the examination in chief of the witness Marsac and the introduction of the documents produced by him before the counsel for the defendants shall be permitted to interrupt that examination.

The Examiner: Proceed in your own way.

Mr. Sherman: I withdraw the offer of Mr. Vaughan's testimony from the Five College record for the present.

Mr. Blaikie: I will continue the examination of
F. 383 Stewart L. Woodford from folio 299.

(See Surrogate's Record, Page 100, folio 299.)

Mr. Bovee: Wait a moment.

Mr. Blaikie: (reading):

Mr. Bovee: Are you reading? I asked you to wait. Counsel for defendants objects to the reading of the testimony of this witness upon the ground that the subject, quoting from the language of complainants' counsel at page 71 of defendants's proofs, "is entirely outside and unrelated to any question presented by the pleas as to the existence or effect or validity of the adjudication by the Five College action of Amherst against Ritch,"
F. 384 that the principle, as claimed by counsel for the complainants, upon which the examination is to be conducted is, that testimony is to be limited to evidence which is related to that subject. Counsel for defendants claims that this is not related to the subject and that the counsel for the complainants has no right to pursue the inquiry or to ask us to read this testimony. We object to counsel for complainants reading excerpts, extracts or paragraphs from the testimony of the witness contained in this record without reading all of the testimony of such witness, and counsel for the defendants insist upon their right in case such excerpts, extracts or paragraphs are read by counsel for the complainants, to

read so much of the testimony as is not read by the counsel for the complainants when he has concluded.

Mr. Blaikie: (reading):

Mr. Bovee: I object to the reading of this testimony in any such manner, and I propose to read whenever the counsel for the complainants leaves off the reading from the testimony in this record right into the record now; the record shall show it; and I ask the Examiner to come here and rule upon that question now. I do not suppose, Mr. Blaikie, that you have any intention of embarrassing the counsel for the defendants by the manner in
F. 385 which you read this testimony, but you can see very plainly that the method you are pursuing in reading this testimony would make it almost impossible, without the stenographer's minutes, to find out what you have read and what you have not read. You are simply skipping from folio to folio, and in my judgment that is not the proper way to read testimony.

Mr. Examiner, we have reached a point in the reading of testimony here which illustrates precisely the abuse which I have complained of. Complainants' counsel is proceeding to read from testimony of Mr. Woodford, who was examined before the Surrogate on the probate of the will. He reads from this printed record—Mr. Woodford's testimony beginning at page 93—he starts the
F. 386 reading of his testimony at page 100—seven pages over at folio 299. He began in the middle of a folio with a question and read down to and into folio 300, and there he stopped. In other words, he begins there with a question and reads part of the answer there. Then he skips from here and reads from there that statement; and then down to here he skips. Now it is manifestly impossible for the defendants to follow the course of their reading, and I propose and insist that we shall have the right to read from the point where they leave off down to the point where they are to begin, so that we will have the testimony of this witness from this record in some consist-

ent form in our own record, otherwise it is manifestly impossible for us except to go through the record word by word and folio by folio to see what they have left out, imposing upon us an enormous amount of labor.

The Examiner: I have ruled on it once; now suppose you go in before Judge Lacombe and ask him about it, he is in his room.

(At this point counsel proceeded to Judge Lacombe's room.)

F. 387 Mr. Bovee: Judge Lacombe, the complainants have called the Clerk of the Surrogates' Court and he has produced and identified the testimony taken before the Surrogate on the probate of the will. Thereupon counsel for the complainants proceeds with the reading of the testimony of Mr. Grout, one of the subscribing witnesses to the last codicil. He has read excerpts from his testimony, only such as he considers favorable to his contention, leaving out very much of the testimony. At the conclusion of his testimony they propose to proceed with the reading of the testimony of General Woodford. I objected and insisted upon my right to read all of the testimony of the witness Grout which they had left out.

That is one of the questions.

F. 388 Judge Lacombe: What have you to say to that.

Mr. Blaikie: Mr. Sherman argued that out before the Examiner, and the Examiner told us we could go ahead in our own way. We want to put in such evidence only as bears on the last codicil, and we see no sense in clogging the record with a vast mass of other matter that we think will be a needless expense, and it seems to sift down to a question of whether they shall, when we are through with one witness, put in what they want.

The Court: It seems to me that that is the proper way for the Court to consider it. The Court does not want to find one eighth of the testimony of the witness on pages 11 to 17 and the other seven eighths on pages 324 to 386

If there is testimony taken here it must be on record, so that it is perfectly well known that you are only reading so much of it as you want, but it ought to appear that the context is whatever it is. If your adversary wants it it seems to me that that is the proper place to put it. The mechanics of the record will be in a hopeless state of entanglement if you do not do that.

Mr. Bovee: I will illustrate. He begins at page 499—it shows just exactly the difficulty that your Honor suggests—he begins the reading at page 499, that is
F. 389 the first part of his testimony, and he reads down to there; then he proposes to skip to there. I I said no, when they stopped I proposed to read whatever they left out.

Judge Lacombe: That would be the best way.

Mr. Blaikie: That plan has this disadvantage, your Honor; they bring in a vast amount here and run up the printing bill.

Mr. Bovee: We do not want any of this testimony, it has nothing to do with the plea.

Judge Lacombe: Of course the easiest way and the most convenient and proper way would be to put the testimony in as it stands, doing something by way of italicizing or underscoring to indicate that the parts
F. 390 thus italized or underscored are what is read in evidence by the complainants, and the other parts by the other side, and that preserves the sequence.

Mr. Bovee: Then we will go on with the testimony of Mr. Grout.

(Examination before the Examiner resumed).

Mr. Bovee: I move to strike out the testimony of Mr. Woodford which has been read as having been prematurely and before the record testimony of the witness Grout was completed, and I now proceed to read so much

of the testimony of the witness Grout as was not read by the complainants' counsel.

(It is stipulated that the testimony read from the record of the witness Woodford be stricken out.)

Mr. Bovee: Counsel for defendants, protesting against the introduction of the testimony of the witness Grout which has been read as irrelevant to the issue pre-
F. 391 sented by the pleas, and under coercion, now reads so much of the testimony of the witness Grout contained in the record in the Surrogates' Court as was not read by counsel for complainants; this testimony to be extended into the minutes by the stenographer from the printed book.

Mr. Blaikie: Counsel for complainants objects to the introduction or this evidence as incompetent, irrelevant and immaterial, no foundation been laid for it, and not proper under the pleas. I do not object to the method.

Testimony offered by Mr. Bovee as follows:

(Here follows deposition of Stewart L. Woodford for which see Surrogates' Record, folios 1513 to 1635.
F. 392

Mr. Blaikie: I now offer in evidence and read from the testimony of General Woodford at page 100—

Mr. Bovee: One moment. Counsel for the defendants object upon the ground that the subject matter of the testimony is entirely outside and unrelated to any issues presented by the pleas as to the existence or effect or validity of the adjudication of the Five College action of Amherst against Ritch; and that the principle, as there claimed by counsel for the complainants, upon which the examination is to be conducted is, that the testimony is to be limited to evidence which is related to that subject.

Counsel for the defendants claim that this is not related

to the subject and that the counsel for the complainants has no right to pursue the inquiry or to introduce the testimony unless upon his professional insistence that the subject does relate to the estoppel created by the special special plea, and if the question is pressed it will be understood that the counsel does make that insistence.

Counsel for the defendants further object to the reading of extracts or paragraphs from the testimony of the witness without reading all of the testimony of the witness contained in the record.

F. 393 Mr. Blaikie: Counsel for the complainants makes no contract or bargain of any kind, but proceeds to read the testimony of Stewart L. Woodford at page 100, folio 299, as follows:

Mr. Bovee: Counsel for defendants objects to the beginning of the reading of the testimony of Stewart L. Woodford from page 100, and insists that the testimony of the witness Woodford shall be read from the beginning at folio 93.

Mr. Blaikie: I propose to begin at page 100; now if Mr. Bovee wants to have anything put in before that, now is his chance.

Mr. Bovee: Go ahead and read where you wish.

F. 394

Mr. Blaikie: (reading):

(Here follows the deposition of Stewart L. Woodford for which see Surrogates' Record, folio 300.)

Mr. Blaikie: Now I will proceed——

Mr. Bovee: Counsel for the defendants object to the counsel for the complainants reading from any paper except the official record produced and identified by the witness Marsac as the official record of the Surrogates' Court.

Mr. Blaikie: Under the stipulation made already as to the use to be made of the transcript of the Surrogate's minutes and the Five College action, counsel calls the attention of the Court to the fact that he is sufficiently protected in using that instead of the other, in view of the fact that the other is imperfectly foliod if foliod at all. Are you going to read any more?

Mr. Bovee: It is impossible in the way in which you are reading this testimony into the record, you are skipping from page 105 or whatever it is to page 215.
F. 395 I would have to examine that testimony to determine whether there is any part of it we desire to read in, and because of the course which you have adopted it is manifestly impossible for the defendants' counsel to determine what they will read or what they will not read.

Mr. Blaikie: I feel the force of that, I will take time and look it up in the original book and read it from that. I will not go ahead any further this afternoon for that reason.

Mr. Bovee: You have at great labor made extracts from the testimony. Can you tell me at what pages you propose to read from General Woodford's testimony.

Mr. Blaikie: Yes, pages 215, 218, 219, 220, 221,
F. 396 222, 224, 225, 226, 228, 229, 230, 231, 232. That is all from the General's testimony before the Surrogate.

Mr. Bovee: Do you read all?

Mr. Blaikie: No, I had not intended to but I think I will. To save you trouble, beginning at page 215, we will read bodily through to the end at page 234. I will read beginning page 215——

Mr. Bovee: Mr. Blaikie, I suggest that we come tomorrow morning, and in the meantime I will read over these pages. Please indicate to me where you will begin.

Mr. Blaikie: Folio 244, the words "Q. Now let us come to the fourth codicil, you drew that you say?"

Mr. Bovee: That is where you will begin to-morrow?

Mr. Blaikie: Yes, and we will continue to the end.

Adjourned to January 19th, 1901, at 10:30 A. M.

F. 397

F. 398

FAYERWEATHER
vs.
RITCH,

REYNOLDS
vs.
RITCH.

F. 399

COMPLAINANTS' TESTIMONY.

NEW YORK, January 19th, 1901.

F. 400 Met pursuant to adjournment. Present: The Examiner, Mr. Sherman, Mr. Blaikie, Mr. Bovee, a representative of Nash & Jones, representative of Butler, Notman, Joline & Mynderse, Mr. McLaughlin, Mr. Fain.

Mr. Blaikie: I read from page 191 of the original minutes of the stenographer produced by the witness Marsac, the Record Clerk of the Surrogate's office.

Mr. Bovee: Counsel for the defendants objects to the reading of this record on the ground that it is irrelevant, immaterial and incompetent, irrelevant to any issue presented by the special pleas herein, that it is entirely out-

side and unrelated to any question presented by the pleas as to the existence or effect or validity of the adjudication in the Five College action, Amherst against Ritch. We object to the reading from this record as incompetent because there is nothing in the law which makes the testimony taken in the Surrogates' Court competent evidence in an issue of this character, and not the best evidence of what the witness actually testified to in that Court; and we further object to the complainants reading extracts from the alleged testimony of witnesses
F. 401 and not the entire testimony given by the witness at the time.

Mr. Blaikie: I will now proceed to read.

(Here follows deposition of Stewart L. Woodford—continued—for which see Surrogate's Record, folio 586 and following folios.)

F. 402

FAYERWEATHER
vs.
RITCH,

REYNOLDS
F. 403 *vs.*
RITCH.

COMPLAINANTS' TESTIMONY.

NEW YORK, January 22nd, 1901.

F. 404 Met pursuant to adjournment. Present: The Examiner, Mr. Sherman, Mr. Blaikie, Mr. Bovee, Mr. Fain, Mr. McLaughlin, a representative of Mr. Kiddle, and a representative of Nash & Jones.

Mr. Sherman: The counsel for the complainants, adopting the suggestion made by Circuit Judge Lacombe, offer in evidence the entire deposition of Stewart L. Woodford contained in the record from which part of it has been read, and propose in making up the printed record, in pursuance of the suggestion or direction of the Circuit

Judge, to italicize that part of the deposition upon which they will rely.

Mr. Bovee: Counsel for defendants objects to the testimony as irrelevant and immaterial to the issue presented by the special plea and as incompetent. We object to it as irrelevant because it is entirely outside and unrelated to any question presented by the pleas as to the existence or effect or validity of the adjudication of Amherst against Ritch.

Mr. Sherman: I will read in evidence all of the
F. 405 deposition that was not read at the last session.

(Here follows continuation of deposition of Stewart L. Woodford for which see Surrogates' Record, folio 279.

Mr. Sherman: The counsel for the complainants further offer and read in evidence, pursuant to the ruling of the Circuit Judge referred to, the deposition of Henry B. Vaughan in the same record, and will, upon the making up of the case for final hearing, likewise italicize that part thereof which they rely upon.

Mr. Bovee: Counsel for the defendants objects to the testimony upon the ground that it is irrelevant, immate-
terial and incompetent, that it is specially irre-
F. 406 levant and entirely outside and unrelated to any
question presented by the pleas as to the existence or validity or effect of the adjudication in the case of Amherst College and others against Ritch. Counsel for the defendants objects and protests against lumbering up the record in this case with such irrelevant matter directly in the face of the expressed opinion of Judge Lacombe in the rulings which he has heretofore made, also in the face of the adjudication of the same Judge upon the plea and the proofs taken upon the plea in Fayerweather against Hamilton College, in which proceeding the bill and complaint as to that defendant was dismissed upon final hearing.

(Here follows deposition of Henry B. Vaughan for which see Surrogates' Record, folio 1894.)

Mr. Sherman: Counsel for complainants likewise reads in evidence from the same Surrogate's record the deposition of Thomas G. Ritch, and upon the making up of the case for final hearing will italicize that part of the deposition upon which the complainants especially rely.

Mr. Bovee: Counsel for the defendants object to the testimony as irrelevant, immaterial and incompe-
F. 407 tent, and as entirely irrelevant and immaterial and outside and unrelated to any question presented by the pleas as to the existence or effect or validity of the adjudication of Amherst College and others against Ritch.

(Here follows the testimony of Thomas G. Ritch before the Surrogate as appears in the Record.)

Mr. Sherman: Counsel for complainants also read in evidence the deposition of Elizabeth R. Joyce taken from the Surrogate's record aforesaid and will, upon making up the case for final hearing, italicize that part of said deposition upon which they especially rely.

F. 408 Mr. Bovee: Counsel for the defendants objects upon the ground that it is irrelevant and immaterial and incompetent, immaterial and entirely outside and unrelated to any question presented by the pleas as to the existence or effect or validity of the adjudication in the Five College action, Amherst College and others against Ritch.

(Here follows deposition of Elizabeth R. Joyce in Surrogates' Record, beginning at folio 809, page 270.)

Mr. Sherman: Counsel for the complainants likewise read in evidence from the Surrogate's record aforesaid

the deposition of Maus R. Vedder and will, upon making up the record for final hearing, italicize that part of said deposition upon which they especially rely.

Mr. Bovee: Counsel for defendants objects upon the ground that it is incompetent, irrelevant and immaterial, that it is immaterial and entirely outside and unrelated to any question presented by the pleas as to the existence or effect or validity of the adjudication in the Five College action of Amherst College and others against Ritch.

F. 409 (Here follows deposition of Maus R. Vedder in Surrogates' Record, beginning at folio 1090, page 364.

Mr. Sherman: Counsel for complainants further reads in evidence from Surrogate's record aforesaid the deposition of Reynold W. Wilcox and will, upon the making up of the record for final hearing, italicize that part of said deposition upon which I especially rely.

Mr. Bovee: Counsel for defendants objects upon the ground that it is incompetent, irrelevant and immaterial, irrelevant and immaterial and entirely ontside and unrelated to any question presented by the special pleas as to the existence or effect or validity of the adjudication of the Five College action of Amherst against Ritch.

F. 410

(Here follows deposition of Reynold W. Wilcox in Surrogates' Record, beginning at folio 1,222, page 408.)

Mr. Sherman: Counsel for the complainants further reads in evidence from the Surrogate's record aforesaid the deposition of Prescott Hall Butler and will, upon the making up of the record for final hearing, italicize those parts of said deposition upon which they especially rely.

Mr. Bovee: Counsel for the defendants objects to reading the testimony of Prescott Hall Butler upon the ground that it is incompetent, irrelevant and immaterial, irrelevant and immaterial and entirely outside and unre-

lated to any question presented by the pleas as to the existence or effect or validity of the adjudication in the Five College action of Amherst College against Ritch.

(Here follows deposition of Prescott Hall Butler in Surrogates' Record, beginning at folio 2,337, page 779.)

Mr. Sherman: Counsel for the complainants further reads in evidence from the Surrogate's record aforesaid the deposition of William Lloyd and will, upon
F. 411 the making up of the record for final hearing, italicize that part thereof upon which they especially rely.

Mr. Bovee: Counsel for the defendants objects to the reading of the testimony of the witness upon the ground that it is incompetent, irrelevant and immaterial, entirely outside and unrelated to any question presented by the pleas as to the existence or effect or validity of the adjudication of the Five College action. Counsel for the defendants protests against the complainants going into the evidence at large in this cause as contrary and in the face of the declaration of Judge Lacombe that it is irrelevant and immaterial, and in the face of his adjudication sustaining the plea of Hamilton College and dis-
F. 412 missing the bill upon final hearing.

(Here follows the testimony of Rev. William Lloyd in Surrogates' Record, beginning at folio 2,649, page 883.)

Mr. Sherman: Counsel for complainants renews his offer in evidence of the exhibits specified as having been retained in the Surrogates' record aforesaid, and as to which the counsel for the defendants made the objection when they were offered that the original Surrogates' record was not then produced and identified, it being now produced and identified.

Mr. Bovee: Counsel for the defendants objects to the offer of the exhibits as being too indefinite and too general, without a proper specification of what is offered, also upon the ground thas it does not appear that such exhibits are in any way a part of the official record of the record in the Surrogates' office by which they could be made competent as evidence here, and not the best evidence of the instruments themselves. Counsel for the defendants also objects upon the ground that they are irrelevant and immaterial to the issue presented by the special
F. 413 plea, and entirely outside and unrelated to any question presented by the pleas as to the existence or effect or validity of the adjudication in the Five College action of Amherst College against Ritch, and in defiance of the expressed opinion of Judge Lacombe that it was irrelevant and immaterial, the opinions filed upon the motions heretofore made herein, and his adjudication upon final hearing upon the plan of Hamilton College in this proceeding.

Mr. Sherman: Counsel for the complainants calls upon the counsel for the defendants to specify upon the record in what capacity he has acted in taken the objections that he has generally for the defendants.

Mr. Bovee: Counsel for the defendants states
F. 414 that in taken the objections that he has for the defendants he intended to take such objections as to all of the defendants who have filed pleas herein, and to whom notice was given of this proceeding.

Mr. Sherman: To whom notice was given by complainants?

Mr. Bovee: Yes, by complainants.

Mr. Sherman: Counsel for complainants calls upon counsel for the defendants to specify in whose behalf he has introduced evidence on behalf of defendants in this proceeding.

Mr. Bovee: Counsel for the defendants states that the evidence which has been adduced on behalf of the defend-

ants as to whom notice of such proceeding was given by counsel for defendants, that notice having been served upon the counsel for the complainants, he knows very well.

Mr. Sherman: That wont give any vitality to the record. You have got to have it appear in the record, and I take this convenient and short way of avoiding more or less trouble. I am perfectly willing that you may fix up your record in this brief way.

Mr. Bovee: I think the record already discloses
F. 415 in whose behalf the testimony is taken on behalf of the defendants.

Mr. Sherman: As I understood it it is taken only on behalf of the executors. That is the way the record reads, I think.

Mr. Bovee: I think that is correct. I am not sure whether Cornell or Marietta gave notice of that or not, I think it was entirely on behalf of the executors.

Mr. Sherman: I do not want to be put in any false position as regards these other defendants; if they propose to avail themselves of your proofs and stand by their pleas I am perfectly willing they should do so, but I want to have it understood that they do one thing or the other.

Mr. Bovee: I suppose you want to know whether
F. 416 the proofs adduced by the defendants upon the notice which was served upon you were in behalf of others.

Mr. Sherman: Counsel for complainants states that he has received no notice of the taking of any depositions in support of the pleas except the notice from Parsons, Shepard & Ogden as solicitors for Bulkley and Vaughan, and Ritch, Woodford, Bovee & Wallace as solicitors for Thomas G. Ritch; and he makes this suggestion upon the record so that any inadvertence may be corrected now, and states that he will rely upon the formal record as made and as corrected at this time.

Counsel for complainants offers in evidence from and

reads in evidence from the case on appeal introduced in evidence on behalf of the defendants, the deposition of Henry B. Vaughan, not as substantive evidence in the cause, but as evidence of what Mr. Vaughan testified to in the action of Amherst College *vs.* Ritch.

Mr. Bovee: The whole deposition of Mr. Vaughan.

Mr. Sherman: Yes.

Mr. Bovee: The counsel for the defendants objects upon the ground that the record from which the testimony is offered is already in evidence and before the
F. 417 Court and that record will speak for itself. It is wholly unnecessary to further encumber the record with reading from the record of Amherst *vs.* Ritch. Counsel for the defendants further objects upon the ground that the testimony itself is irrelevant and immaterial to the issues presented by the special plea.

Mr. Sherman: Counsel for the complainants likewise reads in evidence from the said Five College record the deposition of Thomas G. Ritch, not as substantive evidence in the cause, but as evidence of what Mr. Ritch testified to in the case of Amherst College against Ritch.

Mr. Bovee: Counsel for the defendants objects upon the ground that the matter now offered in evidence is already in evidence in the record offered in evidence and
F. 418 received in this case, of Amherst College *vs.* Ritch, and upon the ground that it is wholly unnecessary to further encumber the record by introducing the same matter on the part of the complainants, also as irrelevant, immaterial and incompetent.

Mr. Sherman: Counsel for complainants likewise reads in evidence from the same record introduced by the defendants in support of their special plea, the deposition of Justus L. Bulkley, not as substantive evidence in the cause, but to show what Mr. Bulkley testified to in the case of Amherst College *vs.* Ritch.

Mr. Bovee: Counsel for the defendants objects upon the ground that the matter now offered is already in evi-

dence in the record of Amherst *vs.* Ritch introduced by the defendants, upon the ground that that record is the best evidence and will speak for itself, irrelevant and immaterial.

Mr. Sherman: Counsel for complainants likewise reads in evidence from said record the complaint of the trustees of Amherst College in the suit of Amherst College and others against Thomas G. Ritch and others, and the answer of Emma S. Fayerweather, Mary W. Achter, and John B. Reynolds as Executor of Lucy Fayer-

F. 419 weather, to show what was in issue in that action.

Mr. Bovee: Counsel for the defendants objects upon the ground that the matters offered are already in evidence in the record in Amherst College against Ritch introduced by defendants, and that that record is the best evidence and will speak for itself. Counsel for the defendants protests against encumbering and burdening the record by again introducing the same matters on the part of the complainants.

Mr. Sherman: Do you want to cross examine Mr. Marsac? If you do we will have him here.

Mr. Bovee: Do I wish to cross examine Mr. Marsac?

Mr. Sherman: Yes.

Mr. Bovee: How can we examine him if he is not

F. 420 here?

Mr. Sherman: We will have him here.

Mr. Bovee: Then I understand that counsel wants me to indicate the time when it will be agreeable to postpone the matter to.

Mr. Sherman: No, I will go on with another witness.

Mr. Bovee: If Mr. Marsac were here I would ask that the cross examination of Mr. Marsac might be suspended and held in abeyance, if we desire to examine him.

Mr. Sherman: Counsel for complainants states that Mr. Marsac, the clerk from the Surrogates' Court, is stated by a messenger from the Surrogates' Court to be ill, and they offer to produce Mr. Marsac for cross exam-

ination if any is desired by counsel for defendants at the earliest date when the state of Mr. Marsac's health and the convenience of the counsel for defendants may concur. In the meantime the counsel for the complainants places at the disposition of the counsel for the defendants the Surrogates' records produced by Mr. Marsac which are still here in the custody of the clerk from the Surrogates' Court.

Mr. Sherman: I read in evidence from the record in Amherst College against Ritch introduced by the
F. 421 defendants the proceedings for the assessment of the collateral inheritance tax in the Surrogates' Court entitled "In the matter of the assessment of the inheritance tax in the estate of Daniel B. Fayerweather, deceased, including the petition verified by Thomas G. Ritch, June 29th, 1891." I call on the counsel for the defendants to produce a letter sent by Arnoux, Ritch & Woodford and Parsons, Shepard & Ogden, attorneys for executors, dated No. 18 Wall Street, New York City, October 26, 1891, purporting to be addressed to the various devisees under the ninth clause of the will.

Mr. Bovee: Counsel for complainants calls upon the counsel for the defendants to produce a letter sent by the executors themselves to third parties, and counsel
F. 422 for the defendants states that manifestly they have not in their possession the letter which they sent to other parties.

Mr. Sherman: Counsel for the complainants means to include within his request the duplicate orignals, some of which it appears from the Five College record were retained by the signers thereto, the letter itself being in print and no one copy more an original than another.

Mr. Bovee: Counsel for the defendants has no further response to make to the demand.

Mr. Sherman: Counsel for the complainants reads in evidence the said letter as the same appears upon pages 609, 610 and 611 of the Five College record. Counsel for

complainants reads in evidence from the Five College record——

Mr. Bovee: Are you through with that offer?

Mr. Sherman: Yes.

Mr. Bovee: I object to that as incompetent, irrelevant and immaterial to any issue presented by the special pleas and as incompetent, and also upon the ground that the matter sought to be introduced here is already in evidence in the record in Amherst College *vs.* Ritch, and that record is the best evidence of what it contains.

F. 423 Mr. Sherman: Counsel for complainants reads in evidence from the Five College record introduced by the defendants the proofs respecting the charter rights of institutions mentioned in the ninth clause of Mr. Fayerweather's will and the admissions in that regard upon the record to the effect that said institutions are all institutions described in the Statute of 1860.

Mr. Bovee: Counsel for the defendants objects upon the ground that it is irrelevant and immaterial to the issue presented by the special plea, and also upon the ground that the record in Amherst *vs.* Ritch has already been introduced in evidence, and that it is a monstrous and outrageous abuse of the 67th Rule of the Court to extend upon the record matters from that record

F. 424 which are already in evidence.

Mr. Sherman: Counsel for the complainants reads in evidence from the record heretofore referred to by the counsel for the defendants, to wit, the pleadings and proofs on final hearing upon the plea of Hamilton College to the bill of complaint herein, the following depositions as they appear in the record on file in this cause; The deposition of Elizabeth L. Goodwin, at pages 88 to 109, the deposition of Dr. John A. Irwin, pages 217 to 226, the deposition of Elizabeth R. Joyce, pages 241 to 252, the deposition of the Rev. Dr. William Lloyd, pages 232 to 237, the deposition of Anner A. Reynolds, pages 255 to 290, the deposition of Maus R. Vedder, pages 56 to 86,

and 146 to 147, the opinion of Lacombe, J., at page 123, the order of Lacombe, J., at page 164, the order on mandate of the Circuit Court of Appeals, at page 237, the receipt of Evarts, Choate & Beaman, at page 116; and in that connection they offer to produce each and all of said witnesses for cross examination by the counsel for the defendants.

Mr. Bovee: Counsel for defendants objects to the matter tendered upon the ground that it is irrelevant, immaterial and incompetent. These defendants were
F. 425 not parties to that record or to the proceedings under which the proof offered was taken, and any such process of introducing the testimony of a witness is wholly unprecedented and unheard of.

Mr. Sherman: You do not seem to be very well acquainted with the taking of testimony in equity proceedings. It is a very well settled method of introducing testimony. The question is whether you want to cross examine them.

Mr. Bovee: Mr. Sherman, I will let you know—— I will seek to let you know whether these witnesses are to be produced for cross examination, at the next hearing. My recollection is the witnesses were not cross examined.

F. 426 Mr. Sherman: That is the reason I tender them for cross examination, but I think on investigation you will find that that is all I need to do.

Mr. Bovee: Whether I shall require them to be produced for cross examination or not is a matter to be determined hereafter. Manifestly it is impossible for me to know what these witness testified to, as I was not a party to that proceeding; and until I advise myself I cannot say. In the meantime I rest upon my objection.

Mr. Blaikie: Some of it is very interesting reading, Mr. Bovee.

Mr. Sherman: Counsel for the complainants points out to counsel for the defendants the fact that the time for

taking complainants' proofs under the existing order has almost expired, and while he concedes the propriety of a reasonable opportunity to decide whether it is desired to cross examine the witnesses, he suggests that a time be specified when the counsel will announce his decision.

Mr. Bovee: Then I suggest that at the conclusion of the hearing to-day the further taking of testimony be postponed until next Monday at two o'clock in the afternoon.

Mr. Sherman: I do not think I can agree to that.

F. 427 Counsel for complainants suggests that the depositions be adjourned until to-morrow morning at 10:30 to enable counsel for the defendants to decide whether he desires the attendance of these witnesses for cross examination.

Mr. Bovee: It will be manifestly impossible for me to examine the record of these witnesses' examination to state whether I want to cross examine them.

Adjourned to Jan. 23rd, 1901, at 10:30 A. M.

F. 428

FAYERWEATHER
vs.
RITCH,

REYNOLDS
vs.
RITCH.

F. 429

COMPLAINANTS' PROOF.

NEW YORK, January 23rd, 1901.

Met pursuant to adjournment. Present: The Examiner, Mr. Sherman, Mr. Blaikie, Mr. Parsons, Mr. Bovee, Mr. Scott, Mr. Fain,
F. 430 a representative of Mr. Kiddle and a representative of Nash & Jones.

Mr. Sherman: I propose to have Mr. Moritz Ellinger sworn as a witness on behalf of the complainants. Here he is, and I ask you to swear him.

Mr. Parsons: We object upon the ground that the Examiner has said that the proper course at this time is to proceed with the examination of Mr. Reynolds.

MORITZ ELLINGER, called as a witness on behalf of the complainants, being duly sworn, testified as follows:

TESTIMONY OF M. ELLINGER.

Direct examination by Mr. Sherman.

1 Q. Mr. Ellinger, have you come here as an employe of the Surrogates' Office with certain writings which you were subpœned to produce?

A. I have.

2 Q. Have you with you the original will and four codicils purporting to be those of Daniel B. Fayerweather?

A. I have.

3 Q. Will you produce them?

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(At this point the witness discovers that he has not brought the papers asked for, and leaves to get them.)

F. 432

TESTIMONY OF W. L. DRUMMOND.

WILLIAM L. DRUMMOND, called as a witness on behalf of the complainants, being duly sworn, testified as follows:

Mr. Sherman: I cannot examine Mr. Drummond until the wills are here. I call upon the counsel for the defendants to specify whether they desire to cross exam-
F. 433 ine the witnesses whose depositions were taken in this cause and are contained in the record of Hamilton College, and which were offered yesterday, in order that I may fix a convenient time for the production of those witnesses.

Mr. Parsons: Counsel for the defendants reiterate the objections that were taken to the admissibility of the depositions of the persons described as witnesses and to whom reference is made; and they add to that that they know of no rule of practice which requires them to inform the counsel for the complainants in advance what they will or will not do, the only mode of tendering witnesses for examination for so-called cross examination which they know being that the witnesses shall be pro-
F. 434 duced and shall be within reach of the Examiner. They proposed by the examination of Mr. Reynolds to show the whereabouts of those witnesses at the time of the so-called offer to produce them, with a view of showing that they were not then accessible for cross examination. As the whole proceeding is against their protest, against their judgment of what the practice of this and of every other court requires, they abstain from action on their part which may facilitate it.

Mr. Sherman: Counsel for the complainants takes the response of counsel for the defendants as being in legal effect a refusal to indicate any time when they desire to cross examine the witnesses, and will leave the defendants

to the practice and process available to them to secure the attendance of said witnesses inasmuch as counsel for the complainants have to the extent of their power placed those witnesses at the disposal of the counsel for the defendants for cross examination, and insist that the depositions having been taken in this cause they have performed the full measure of their obligation to entitle them to read those depositions between any parties to this cause in the offer which they have made to present those witnesses for cross examination.

F. 435 Mr. Parsons: Counsel for the defendants have nothing to add except that they are not responsible for what may be in the mind of the counsel for the complainants. They do not acquiesce in the position which he states.

Mr. Bovee: Mr. Examiner, I do not know that you understand the situation with respect to this testimony.

The Examiner: Do you mean the depositions?

Mr. Bovee: Yes, sir. The counsel for the complainants yesterday read from the record on the Hamilton College plea the testimony of a number of witnesses examined on that plea.

The Examiner: By consent?

Mr. Bovee: By no consent, and against our pro-

F. 436 test and objection. The witnesses were not produced here.

The Examiner: You had no chance to cross examine?

Mr. Bovee: Had never seen them. He read from that record.

The Examiner: Without your consent?

Mr. Bovee: No, we had nothing to do with it whatever. That was upon the insistence of the other side that it was the practice of this Court in equity.

Mr. Sherman: I have nothing to say about that at this time. If that evidence is not effective it will not be. I will proceed with the examination of Mr. Drummond.

TESTIMONY OF W. L. DRUMMOND.

Direct examination by Mr. Sherman:

1 Q. What is your occupation?

Mr. Parsons: I ask the Examiner to note that it is twelve o'clock when this examination begins.

A. Expert photographer.

2 Q. What experience have you had in that respect?

A. I have had the experience since 1884 working under the instructions of my father in accident damage cases, handwriting documents, etc.

F. 437 3 Q. Did you go to the Surrogates' Office of the County of New York to take photographs of the signatures of the will and codicils of Daniel B. Fayerweather?

A. I did.

4 Q. Do you remember when that was?

A. On December 4th, 1900.

5 Q. And did you take photographs of the parts of the codicils and will which contained the signatures?

A. I did.

6 Q. (Handing photographs) Look at the four prints mounted upon cards which I hand you and state whether those are prints from plates taken by you of those documents on that occasion?

F. 438 A. No, sir.

7 Q. Did you take photographs of the signatures of the will and four codicils?

A. I did, sir.

8 Q. Did you develop them?

A. I did.

9 Q. And print them?

A. I did.

10 Q. (Handing photographs) Look at the two prints mounted on cards which I now hand you and say whether those were taken by you.

A. No, sir.

11 Q. (Handing photograph) Look at the print which

I now show you and state whether that was taken by you of the signature to the codicil.

A. Yes, sir; it was.

12 Q. Is that an enlargement from a plate taken by you?

A. It is; yes, sir.

13 Q. The plate from which that enlargement was taken, was it the original plate upon which you took the first photograph or picture?

A. No, sir.

14 Q. How did you enlarge it?

F. 439 A. A representative or a clerk from the Surrogates' Office came down to the office of A. J. Drummond, 50 Fulton street, bringing this signature with him, and I enlarged a negative plate from it from which this here was enlarged a number of times, from the plate which was made in the office.

15 Q. Where is the plate from which this picture which you have before you was printed?

A. That is in the office.

16 Q. What office?

A. The office of A. J. Drummond, 50 Fulton street.

17 Q. And did you yourself make the exposure for that photograph?

A. I did everything from beginning to end.

F. 440 18 Q. Is that photograph which is before you a correct representation of the signature to the paper which was produced from the Surrogates' Office on that occasion?

A. It is.

Mr. Sherman: I ask to have it marked for identification.

The photograph was marked Complainants' Exhibit for Identification, January 23rd, 1901, CB.

Mr. Parsons: That and the testimony of the witness are objected to upon the ground that a similar line of ex-

amination has been declared by the counsel for the complainants time and time again to be irrelevant to the issue created by the special plea, it has been held by Judge Lacombe to be irrelevant, and that the counsel for the defendants maintain that it is irrelevant, and that under the circumstances to insist upon introducing evidence of this character into the case is a violation of the rules of the Court and of its practice and of any practice of any court under similar circumstances.

19 Q. The orignal paper from which that photo-
F. 441 graph was taken, was it partly printed, or entirely in script or handwriting?

Mr. Parsons: Same objections, and furthermore a protest by counsel for the defense against the continuation of the examination by reason of the fact that it is being used for the purpose of preventing the cross examination of the witness Reynolds which the Examiner has held to be the matter in proper order.

Mr. Bovee: One moment. We make the further objection that the paper referred to is the best evidence and will speak for itself, and the testimony is, therefore, incompetent.

A. If I remember right, it was written and partly printed.

F. 442 20 Q. Did the plate which you exposed on that occasion take any more than the signature?

A. No.

21 Q. Was the paper which you then took one which you had previously taken upon another occasion?

A. It does, yes, sir.

22 Q. That does not answer the question. Was the paper which you then took one which you had previously taken upon another occasion?

A. The plate which I had taken of this signature on a previous occasion shows more than the original signature, it shows writing above it and below it.

23 Q. How long would it take you to get that plate here from your office?

A. Five minutes.

24 Q. Could it be sent here on a telephone notice?

A. I do not think so; I have charge of that.

Mr. Sherman: Counsel for the complainants defers the further examination of this witness until the will and codicils shall be produced from the Surrogates' Office, the particular person having them in custody in the Surrogates' Office not being present, not having attended
F. 443 under the subpœna, upon the excuse that some sickness in his family, childbirth or something of the kind, prevented.

Mr. Parsons: Counsel for the defendants object, and states the ground of their objection that the counsel for the complainants prevented proceeding with the examination of the witness Reynolds upon the assertion among other things that there were in attendance before the Examiner witnesses whose testimony would occupy the morning; that the proceeding having been noticed for or adjourned to half past ten o'clock, it was twelve o'clock before the examination made any pretense of starting, and that the practical result is that the counsel for the defense have been compelled to waste the morn-
F. 444 ing and have also been balked in the attempt to examine the witness Reynolds.

Mr. Sherman: Mr. Shields, I would like to have you swear Mr. John E. Parsons as a witness.

Mr. Parsons: Mr. Parsons declines to be sworn. He attends here as counsel.

Mr. Sherman: Counsel for the complainants requests the Examiner to certify the refusal of Mr. Parsons to be sworn to the Court.

The Examiner: Do you want to say anything?

Mr. Parsons: I do not want to say anything except to call your attention to the fact that you have ordered that the proper proceeding for this morning is the examination

by us of Mr. Reynolds, that that has been balked by the instruction from Mr. Sherman to his own client to decline to answer, that the excuse made by counsel for not proceeding with the examination of Mr. Reynolds, among others, was that he had witnesses in attendance under subpœna with whose examination he desired to occupy the morning, that he waited until twelve o'clock before anything was done, then the witness was put upon the stand, and after a few minutes of examination counsel stated that his further testimony would be deferred,

F. 445 that I am not here under subpœna, I attend here as counsel.

The Examiner: The Examiner so certifies the record.

Mr. Sherman: I object to your certifying the statement of Mr. Parsons as the fact without anything further.

The Examiner: I did not know you wanted to say anything.

Mr. Sherman: I desire to say in response to the statement of counsel that the record upon which he is now including his remarks concerning the testimony for the defendants is the record of the complainants' proofs, that it is obvious from the record of the defendants' proofs taken yesterday to which reference is made that if it was the intention of the defendants' counsel to have

F. 446 Mr. Parsons here to-day they took a most elaborate and studied course to conceal that fact from counsel for the complainants, that counsel for the complainants had no reason to suppose that Mr. Parsons would attend to-day to examine Mr. Reynolds, but every reason to suppose that he would not so attend, and especially the declarations to that effect by the associate counsel for the defendants, Mr. Bovee; that he had not under the circumstances rested with Mr. Reynolds' cross examination, and that it remains open, that he is not yet prepared to close it, and that the insistence of Mr. Parsons is apparently due to the circumstance that he supposes that the accident of his being unexpecedly able to be

present here shall subvert the record and require that the convenience of everybody, counsel and witness, and the proper conduct of the cause shall be subrogated to his personality a proposition that the complainants' counsel declines to conform to or recognize as well founded or having any effect or force whatever.

Mr. Parsons: ' Mr. Shields, we have some respect for the position which you occupy and have desired to loyally observe such directions as were made by you. You know the situation, you know what has occurred, you
F. 447 understand that our position is that every consideration of propriety and of decency has been violated here. If, under the circumstances, you rule that I being here, counsel has the right to put me upon the stand as a witness, protesting against such a course, I submit to your ruling and will be sworn. I leave it to you to say.

The Examiner: You are the best judge of that.

Mr. Parsons: I will leave it for you to say; I want to know what your order is. I do not want to be an acquiescent witness, and I protest against the course adopted, but if you order that I be sworn as a witness I shall comply with your order.

The Examiner: Well, I am under the impression,
F. 448 Mr. Parsons, you had better be examined.

JOHN E. PARSONS, called as witness in behalf of the complainants, being duly sworn, testified as follows:

Direct examination by Mr. Sherman:

1 Q. Mr. Parsons, did you discuss with Mr. Frederic R. Coudert the settlement embodied in the releases
F. 449 set up in the plea in this case?

A. I do not remember any such discussion.

2 Q. Do you remember the occasion when the probate of the codicils to Mr. Fayerweather's will was pending in the Surrogates' Court of the County of New York?

A. I do.

3 Q. Do you remember the occasion of Mr. Prescott Hall Butler being on the stand as a witness when a ruling was made by the Surrogate in substance that he should answer the questions put to him as to the contents of a codicil to Mr. Fayerweather's will stated to have been executed on the 11th of November, 1890?

Mr. Bovee: We object to the question as incompetent; we object to the testimony and to the question as
F. 450 irrelevant and immaterial to any issue presented by the special plea.

A. I am not clear in my recollection as to whether I was personally present at that particular time or not, I presume that the record will show. I had general knowledge at the time of the fact that Mr. Butler was put upon the stand and declined to answer questions that were put to him and that Mr. Choate attended before Surrogate Ransom on his behalf; how much of that was within my personal knowledge and how much was within my professional information at the time, I cannot discriminate.

4 Q. Did you participate in the discussion as to the propriety of requiring Mr. Butler to answer.

A. Not to my recollection.

5 Q. After that ruling was made — and by the way, there were no answers to the questions upon that subject made by Mr. Butler, were there?

A. I prefer to refer to the record for what occurred at that time and not to trust my memory.

6 Q. What is your best recollection?

Mr. Bovee: We object to it as irrelevant and immaterial to the issue presented by the special plea, as incompetent, and the record is the best evidence of what
F. 451 transpired.

A. I have no other recollection than that which I have already stated.

7 Q. You say you have no recollection as to whether Mr. Butler answered in the Surrogates' Court as to the contents of the codicil of November 11th, 1890?

A. I have no recollection upon the subject; I know either from the fact that I was present or from information which I had at the time that Mr. Butler objected to answering about the contents of that paper and that he did not answer.

8 Q. With whom, representing Mrs. Fayerweather, did you have such discussion or communication as you had prior to the execution of her release and re-
F. 452 lating in any wise to the settlement which led to that release?

The Witness: Read that.

(Question No. 8 repeated by stenographer.)

A. I have no recollection of any such discussion or any such conversation as is assumed in the question. I did see Mr. Coudert, Mr. Frederic R. Coudert, on one or more occasions before the settlement was made; I think only once.

9 Q. Is he the only person representing Mrs. Fayer-

weather with whom you had any communication on that subject prior to the execution of the release?

A. He is so far as I have any present recollection.

10 Q. Did you have any communication with any one on their behalf or representing Emma S. Fayerweather or Mary W. Achter on that subject prior to the execution by them of releases or on their part?

A. Not to my recollection.

11 Q. Did you know that Daniel G. Rollins represented them as counsel in the Surrogates' contest?

F. 453 A. Judge Rollins appeared in the Surrogates' contest and acted in co-operation with Mr. Coudert; the part taken by both of those gentlemen was general. I have a recollection that in some way I understood that Mr. Coudert claimed to be the particular representative of Mrs. Fayerweather and Judge Rollins of the two other persons of whom your question inquires.

12 Q. So far as you know or then had any reason to believe did Mr. Frederic R. Coudert and Daniel G. Rollins comprise all the representatives of Lucy Fayerweather, Emma S. Fayerweather and Mary W. Achter during the Surrogate's contest and up to the time of the settlement?

A. I understood that the persons whom you speak of as Mrs. Emma Fayerweather and Mrs. Achter

F. 454 were also represented by Judge Morris B. Beardsley, Judge of Probate at Bridgeport, Connecticut.

13 Q. Did you have any communication with Mr. Rollins or Mr. Beardsley on the question of settlement with either of those ladies?

A. Not that I recollect, although it is possible that in connection with the execution of the papers I may have seen Judge Beardsley; I do not recall it.

14 Q. By the execution of the papers you refer to those papers which carried into effect the agreement previously reached?

A. I refer to certain papers which were executed, if my memory serves me correctly, by Judge Beardsley as

attorney for those persons. What they are I do not recall at the present time, and I may be mistaken in my recollection that the papers were executed by Judge Beardsley as attorney. What I recall is that it was said by somebody at the time that Judge Beardsley had held powers of attorney from Mrs. Emma Fayerweather and Mrs. Achter.

15 Q. Were you the senior counsel in reference to the conduct of the contest in the Surrogates' Court?

A. I do not know Judge Arnoux's age, but I am
F. 455 quite inclined to think that I was his senior; he and I were the principal counsel for the probate of those papers.

16 Q. Did you understand by my last question that I referred to the relative age of Mr. Arnoux and yourself?

Mr. Bovee: Counsel for the defense admits that Mr. John E. Parsons was senior counsel for the executors on the probate proceedings and they object to the question as irrelevant and immaterial.

Mr. Sherman: Counsel for complainants inquires whether that admission refers to the relative age of the two gentlemen or to the dominant control of the litigation, in which sense the question was asked.

The Witness: It would be impossible for me to—
F. 456 Mr. Sherman: That is addressed to Mr. Bovee. Does your admission relate to Mr. Parson's age, Mr. Bovee?

Mr. Bovee: The admission made by counsel for the defendants relates to Mr. Parson's relation to the law suit as senior counsel, and any further inquiry upon that subject, we submit, is entirely incompetent, irrelevant and immaterial to the issue presented by the special plea; and I advise the witness not to answer.

The Witness: I propose to answer.

Mr. Sherman: The counsel for the complainants accepts the admission, and in view of the admission withdraws the question.

The Witness: The witness does not accept the admission.

Mr. Sherman: I withdraw the question. That leaves the witness without a question.

The Examiner: That withdraws the question, Mr. Parsons.

17 Q. Can you mention any other source of information which was, at the time of the negotiation for settlement with Lucy Fayerweather, Emma S. Fayerweather and Mary W. Achter, open to them as to the facts
F. 457 proper for them to consider in deciding as to the acceptance of the proposition for settlement, than yourself?

A. I think I fail to understand what the counsel means by speaking about me as a source of information. I was of counsel for the executors. The persons referred to were represented by the most competent counsel, Judge Rollins and Mr. Coudert. These gentlemen, were, as I assume, as I believe; fully possessed of all information bearing upon the subject, and I have every reason to suppose that in the discharge of their duty they communicated to their clients such information as they had, upon which subject I know nothing.

Mr. Sherman: I move to strike the answer out
F. 458 as not responsive. The question is repeated.

(Question No. 17 repeated by stenographer.)

The Witness: I have nothing to add to my previous answer.

18 Q. On or about the 30th of April, 1891, did you have an interview with Frederic R. Coudert wherein you and he discussed the settlement of the controversy then pending in the Surrogates' Court?

A. I had an interview with Mr. Coudert at some time, and I presume at or about that date, at which was

mentioned the subject of such a settlement. I would not say that what occurred could be called a discussion.

19 Q. Did this interview which you have in mind occur in the evening?

A. Not to my recollection.

20 Q. Do you recall any interview with him on that subject which occurred in the evening?

A. I do not at this time.

22 Q. Did you in the interview referred to suggest to Mr. Coudert that the executors and residuary
F. 459 legatees should pay Mrs. Fayerweather $250,000 net to settle her claim and those of the Muscatine heirs?

A. I do not remember it. It is impossible after an interval of nine years for me to remember details about such an occurrence.

22 Q. Have you in your possession or power any memoranda which will aid you in refreshing your memory upon that point?

A. I cannot say.

23 Q. Did you in that interview estimate the fee of Judge Rollins and of Mr. Coudert's office to come out of the amount at $50,000 and propose to him that Judge Rollins and his office should deduct that amount
F. 460 from that sum in case the offer was accepted?

A. I have no such recollection.

24 Q. Do you recollect that you made no such suggestion?

A. I recollect that in some way I was informed of the charge of Judge Rollins and that I was also informed in some way, possibly by Mr. Coudert, of the amount of his own charge.

25 Q. Do you remember whether Mr. Coudert replied to your suggestion that your proposition would not satisfy Mrs. Fayerweather, but that if he — that is you — would add a provision of $10,000 per annum additional, he, Mr.

Coudert, would submit it to Mrs. Fayerweather for her consideration and decision?

A. No.

24 Q. Prior to that interview with Mr. Coudert had an offer been made to pay Mrs. Fayerweather $100,000 and $10,000 per annum and also to pay the Muscatine heirs $100,000?

A. I do not know.

27 Q. You had made no such proposition?

A. Not to my recollection.

F. 461 28 Q. Mr. Parsons, did you keep the run of the evidence in the Surrogates' Court on the will contest?

A. Yes.

29 Q. Was Henry B. Vaughan examined as a witness on the contest?

A. He was.

30 Q. Do you recall an envelope upon the back of which, according to his testimony in the Five College action, Mr. Vaughan took down from Mr. Fayerweather's lips on the morning of November 15th, 1890, instructions for a codicil to be executed, and which envelope was marked in evidence in the Five College action, Exhibit OA?

F. 462 Mr. Bovee: Counsel for defendants objects to the question as incompetent, and to the matter sought to be elicited as irrelevant and immaterial to the issues presented by the special plea, and that the record in the case of Amherst College against Ritch already in evidence here is the best evidence of what transpired on that trial, and that the record of the trial in the Surrogates' Court which has heretofore been produced by the counsel for the complainants in this proceeding is the best evidence of what transpired in the Surrogates' Court.

The Witness: Mr. Carnochan, let me see the Truax record, if you please.

(Book handed witness.)

The Witness: What is the question?

(Question No. 30 repeated by stenographer.)

A. I remember that upon the trial of the five colleges' suit Mr. Vaughan was examined as to what occurred between Mr. Fayerweather and himself on November 15th, 1890, and that to refresh Mr. Vaughan's recollection or in corroboration of his testimony I put in evidence some memoranda which had been made by him on an
F. 463 envelope on that day. I do not remember Mr. Vaughan testifying that the memoranda were taken down from Mr. Fayerweather's lips.

31 Q. Do you know where that envelope is now?

A. I do not.

32 Q. When did you last see it?

A. I certainly saw it on the trial of the five colleges' suit, because I put it in evidence myself. I have no present recollection to have seen it since.

33 Q. Have you any knowledge where it is now?

A. None. I presume it is somewhere among the Fayerweather papers, but there are bushels of them. Whether the fact is so or not I do not know. What I do know is this, that, having been subpœnaed as a
F. 464 witness a month or so ago by Mr. Sherman, or I assume by Mr. Sherman, to produce that envelope, I directed a search to be made in my office for it and the answer was that it could not be found. There is a copy of it in the records of the five colleges' suit.

34 Q. Did Mr. Vaughan testify in relation to that envelope marked OA in the Five College action in the course of his testimony before the Surrogate on the will contest?

Mr. Bovee: We object on behalf of the defendants on the ground that the matter is irrelevant and immaterial to the issue presented by the special plea, and as incompetent on the ground that the record in the Amherst col-

lege case or the probate proceeding is the best evidence of what was testified to there.

The Witness: Now what is the question.

(Question No. 34 repeated by the stenographer.)

A. Mr. Vaughan, on the trial before the Surrogate, testified to what passed between Mr. Fayerweather and himself on November 15th, 1890, to the same effect as did he testify upon the trial of the five colleges' suit.
F. 465 His testimony upon the Surrogates' trial, if my memory serves me correctly, was in answer to Mr. Coudert, counsel for the proponents taking the position that the Surrogates' contest was to be limited to matters which bore upon the issue of will or no will, and that matters relevant to other proceedings were immaterial and irrelevant there, none the less Mr. Vaughan did give—or testified to what occurred about other institutions, and if my recollection is correct, precisely the same as did he testify before Judge Truax. The importance of the memoranda was that if any question were made of the testimony of Mr. Vaughan, the memoranda furnished a certain amount of corroboration, and furthermore, they refreshed Mr. Vaughan's recollection. Aside from
F. 466 that the memoranda were incompetent and were immaterial.

Mr. Sherman: I move to strike the answer out as not responsive. Read that question again.

(Question No. 34 repeated by stenographer.)

Mr. Bovee: We object to striking out the answer of the witness.

The Witness: The memorandum which I understand to have been the subject of testimony here appearing on the back of Exhibit OA is "more institutions for benefit." Mr. Vaughan did testify about what occurred between

Mr. Fayerweather and himself upon that subject. If the question asks whether, before the Surrogate, direct reference was made by Mr. Vaughan to the back of the envelope, I do not recollect that any such reference was made. He testified to the conversation.

35 Q. Mr. Parsons, was any other reference made to this envelope in the contest in the Surrogates' Court except this, that there came up in the Surrogates' Court a question as to when a certain letter had been mailed by Mr. Thomas G. Ritch, mailed or written by Mr.

F. 467 Thomas G. Ritch, that there was a controversy between witnesses as to whether it had been written on the 13th or the 14th of November, 1890, that it was mentioned by Mr. Vaughan that the post mark on an envelope for that letter would show, that there was a call by Mr. Coudert for the production of that envelope, that Mr. Coudert thereupon said, "Where is the envelope?" whereupon Judge Arnoux interposed with the statement that the contention was right, that it was the 14th of November? Is there any other reference to that envelope in the Surrogates' record than that, or that in substance?

Mr. Bovee: We object to the question as incompetent and calling for the contents of the record which has already been produced by counsel for the complainants

F. 468 upon this proceeding, and that that record is the best evidence of the proceedings had upon the probate of the will. We object to the matter sought to be elicited as irrelevant and immaterial to the issues presented by the special plea.

A. It is impossible for me to remember such details.

36 Q. Does it refresh your memory to call your attention to the fact that upon Mr. Arnoux's interposition you followed it up by saying it was the Friday?

Mr. Bovee: We make the same objection as before.

A. It does not; I have no memory of the details of what then occurred.

37 Q. Was there any statement in the Surrogates' con-

test by any witness that the envelope thus referred to contained upon it any writing embodying instructions given by Mr. Fayerweather on November 15th, 1890, for the preparation of a codicil to his will?

Mr. Bovee: We object on the ground that the record in the Surrogates' Court is the best evidence of what transpired upon the trial; we also object to the matter sought to be elicited on the ground that it is irrelevant and immaterial to the issues presented by the special pleas.

F. 469 The Witness: What is the question?

(Question No. 37 repeated by stenographer.)

A. The proceedings before the Surrogate were taken down by a stenographer. I presume that his minutes will show what occurred. If the question asks my present memory upon the subject, I can only repeat the answer which I have heretofore given that it is impossible for me after nine years to remember details of that kind.

38 Q. Mr. Parsons, did you hear Jabez Holmes, Jr., testify in the case of Amherst College *vs.* Ritch before Judge Truax?

A. I presume so if he were examined as a wit-

F. 470 ness. I was present at that trial.

39 Q. I will read from the Five College record which the defendants have introduced what purports to be his testimony in that trial, and thereafter ask you a question about it. Pages 748 and 749:

"Jabez Holmes, Jr., called by Mr. Root, being sworn, testified as follows:

"Q. Have you examined the testimony of Mr. Vaughan before the Surrogate upon the contest of Mr. Fayerweather's will as is contained in this volume to which counsel has been referring you, and from which I have just been reading? A. I have.

"Q Did you examine it to ascertain whether there was any reference in that testimony to the envelope which has been marked "Exhibit OA," and which is said to have contained the letter of Mr. Ritch to Miss Joyce?"

Then follows some objections.

"A. I did.

"Q. Was there a reference made to that envelope?

"A. There was.

F. 471 "Mr. Root: I read the reference from page 687. The letter appears at page 686, and that is followed by this: 'That is signed by Mr. Ritch.'

"Mr. Parsons: I think you had better give Mr. Ritch's signature.

"Mr. Coudert: It is signed, Thomas G. Ritch.

"It is conceded all to be in Mr. Ritch's handwriting.

"Mr. Parsons: Yes.

"Q. Mr. Ritch states in this letter of the 13th that he has had two long talks with you. Is that true? A. I think that date is a mistake.

"Q. What do you think was the date? A. I
F. 472 think the letter must have been written on the 14th.

"Mr. Coudert: Where is the envelope of this?

"Mr. Arnoux: Mr. Ritch says that is correct, it was the 14th.

"Mr. Parsons: It was the Friday.

"Q. Is that the only reference made in the course of Mr. Vaughan's testimony to the envelope of the Joyce letter? A. That is the only one I saw."

Mr. Parsons, is your memory refreshed by that which I have read you as to whether in the Surrogate's contest

any testimony was given respecting the envelope marked Exhibit OA in the Five College record?

A. My memory is not refreshed by the testimony which is attributed to Mr. Jabez Holmes. If Mr. Holmes' statement about what he testified to is correct, he said that he only saw a certain reference to the envelope. Whether he did or did not or whether there is or is not any such reference I could only tell by an examination of the record of the proceedings before the Surrogate. I do remember, as a matter of memory, that as to
F. 473 some letter which came in evidence before the Surrogate, a question arose as to which reference was made to an envelope to fix the date, and it may be that it was this envelope about which inquiry is made; whether that is so or not I cannot as a matter of memory recall.

40 Q. Does your memory serve you that the envelope in question was the cover to a letter written by Thomas G. Ritch to Miss Joyce and that the letter it enclosed was put in evidence in the Surrogate's contest?

Mr. Bovee: Counsel for defendants objects upon the ground that the matter sought to be elicited is irrelevant and immaterial to the issue presented by the special plea.

Witness: What is the question?

F. 474

(Question No. 40 repeated by stenographer.)

A. I can state my memory upon the subject if desired.

41 Q. I desire nothing but a responsive answer to the very matter inquired about.

A. I can give my memory about the matter inquired of; I do not recall that there occurred what is implied or assumed in the question.

Mr. Sherman: Read the question, Mr. Stenographer.

(Question No. 40 repeated by stenographer.)

The Witness: I remember that the envelope was assumed to have been the envelope in which was contained some letter which must have been written prior to November 15, 1890, because it was in Mr. Vaughan's possession on that date and his memorandum about other institutions for benefit was written on the envelope which contained this letter, and it may easily be that the letter was from Mr. Ritch to Miss Joyce; I cannot state that as a

F. 475

matter of memory.

42 Q. Do you remember that the envelope in question was in your personal possession at the time the letter in question was produced and put in evidence in the Surrogates' Court, and that you produced the letter without the envelope?

Mr. Bovee: Counsel for defendants objects to this question and examination upon the ground that it is irrelevant and immaterial to the issue presented by the special pleas.

The Witness: Now read the question.

(Question No. 42 repeated by stenographer.)

F. 476

A. I can only repeat what I have frequently said that it is impossible for me as a matter of memory to recall the details of this character. I remember in a general way that there were produced, and I think very likely by me, certain memoranda and certain letters, and if the letter which is assumed to have been within this envelope was called for, and I think that it was, then both the letter and the envelope were in the Surrogates' Court.

Mr. Sherman: I move to strike out all of the answer beginning "and if" as not responsive and hypothetical.

43 Q. Mr. Parsons, have you now in your mind any positive impression that the envelope marked O-A in the Five College trial was ever exhibited to any one or seen by any one after the 15th of November, 1890, until after the execution of the releases, I mean by any one either counsel for or representing Lucy Fayerweather, Emma S. Fayerweather or Mary W. Achter?

Mr. Bovee: Defendants' counsel objects on the grounds that it is irrelevant and immaterial to the issue presented by the special plea.

F. 477

(At the request of the witness, Question No. 43 was repeated by stenographer.)

A. I have no present positive recollection on the subject one way or the other. What I know is that upon the trial before Surrogate Ransom the conversation to which the memorandum "More institutions for benefit" referred, was testified to by Mr. Vaughan, and I think in answer to Mr. Coudert, and I think that the record will show that such was the fact and that Mr. Coudert knew about that conversation at that time.

Mr. Sherman: I move to strike out so much of the answer as begins, "and that Mr. Coudert," and

F. 478 from there on, as not responsive.

Mr. Bovee: We object to the striking out.

44 Q. Is it not true, according to your best recollection, Mr. Parsons, that the only allusion made by Mr. Vaughan upon his testimony in the Surrogate's Court to a conversation with Mr. Fayerweather about more institutions for benefit is contained in a statement which Mr. Vaughan there made described to be a conversation with Mr. Fayerweather on the afternoon of November 15, 1890, and after the execution of the codicil bearing date that day?

Mr. Bovee: Counsel for defendants objects upon the ground that the matter is irrelevant and immaterial to the issues presented by the special pleas.

(At the request of the witness, Question No. 44 was repeated by stenographer.)

A. I have no memory as to what was the testimony about the period of the day when that conversation took place. I have a distinct memory that Mr. Vaughan testified before the Surrogate, and I think in answer to Mr. Coudert, about that conversation, something about putting their heads together.

F. 479

45 Q. And do you not remember that that was stated by Mr. Vaughan to have occurred on the afternoon of November 15th, 1890, and after the execution of the codicil?

Mr. Bovee: Counsel for the defendants objects as irrelevant and immaterial to the issue presented by the special plea, and that the record heretofore produced by counsel for the complainants of the proceedings in the Surrogates' Office is the best evidence of what there transpired.

(At the request of the witness, Question No. 45 was repeated by stenographer.)

F. 480

A. I remember that upon the trial before Judge Truax there was taken against the executors the objection that that conversation related to a future codicil or will, and I have a sort of recollection that that was put upon the time or the hour on the 15th of November, 1890, when there occurred between Mr. Fayerweather and Mr. Vaughan the conversation referred to; but without reference I cannot recall Mr. Vaughan's testimony as to what occurred at one time or other of the times when he saw Mr. Fayerweather on that day. I remember distinctly the position that was taken about it at some stage of the litigation adverse to the executors.

Mr. Sherman: I move to strike the answer out as not responsive.

Mr. Bovee: We object.

Mr. Sherman: The question is repeated. Read it again.

The Witness: It is unnecessary to read it. I have got full memory on the subject. At this period of time it is impossible for me to remember all those details or to separate in my mind the testimony or the occurrences of November 15, 1890, from the testimony in reference to them. I can tell by reference to the record of Mr. Vaughan's testimony. I presume that the stenog-
F. 481 rapher's minutes will show.

46 Q. Was not the question whether that conversation with Mr. Fayerweather, whether that mere memorandum of Mr. Fayerweather's instructions for his codicil occurred and was made before or after the execution of the codicil of sufficient importance to leave upon your mind a distinct impression as to the testimony on that subject respectively in the Surrogates' contest and in the Five College action?

Mr. Bovee: We object to the question as incompetent.

(At the request of the witness, Question No. 46 was repeated by stenographer.)

A. My claim upon the Surrogates' contest was
F. 482 that the issue was there will or no will, and that questions bearing upon the subject of colleges or institutions more or otherwise was irrelevant; therefore I did not regard that as important upon the Surrogates' trial. Upon the trial of the Five Colleges' suit there was presented the question of whether Mr. Fayerweather intended that a part of his estate, his residuary estate, should or should not go to the colleges named in the will. It seemed to me that to that question was relevant anything said by him at any time up to his death, and to the question then presented it did seem to me that the testimony given by Mr. Vaughan before the Surrogate, and

repeated by him before Judge Truax, was important. If you discriminate the memorandum on the envelope from the conversation of which it was a memorandum, the envelope of itself had no importrnce whatever, it was not competent testimony; the question was of the conversation; and in the view that I took at that time, so far as I can now recall, I do not like to depend upon my memory, it was unimportant when any such conversation took place.

47 Q. Did you testify as a witness upon a refer-
F. 483 ence before Mr. Dayton who was a referee appointed by the Surrogate in connection with the accounts of the executors under the will of Mr. Fayerweather?

A. I did. Does the question limit itself to the Surrogate's proceeding?

48 Q. Yes.

A. Then my answer is that I testified before Mr. Dayton, whether it was in the Surrogate's proceeding or the Supreme Court suit I cannot now recall.

49 Q. Was there a conference between yourself and Mr. Ritch and others, antecedent to this Surrogate's contest or during its pendency, the outcome of which conference
F. 484 was that all of the memoranda that were produced upon the Surrogate's trial and which subsequently were used on the trial berore Judge Truax were sent to Mr. Coudert with a statement that it was not for them, the executors, by withholding information to endeavor to swerve the result of the litigation one way or the other, that their duty was to submit all the data of which they knew to anybody who desired and requested, and then to leave the responsibility of the probate contest or of any other contest that anybody might start upon the Court?

Mr. Bovee: Counsel for the defendants objects upon the ground that the matter is irrelevant and immaterial to the issue presented by the special plea.

A. There was such a conversation so far as concerns anything that had passed between Mr. Fayerweather and either of the executors and so far as concerned any memaranda or writings of Mr. Fayerweather; and so far as I know all such writings and memoranda were submitted to Mr. Coudert and were used in the litigation; whether all were used before the Surrogate or all were used before Judge Truax I cannot as a matter of memory recall.

50 Q. Was the envelope marked OA in the Five College action submitted to Mr. Coudert at any time
F. 485 while the Surrogate's contest was going on?

Mr. Bovee: Same objection.

A. That was not a memorandum or writing of Mr. Fayerweather or a paper which had passed between him and any one, it was a memorandum of a conversation and the conversation was testified to by Mr. Vaughan before the Surrogate. If the question asks whether the envelope was sent to Mr. Coudert, I assume not.

51 Q. You have no recollection that he ever saw it, have you, before the settlement?

A. If you mean whether I have any present recollection, I have no present recollection upon the subject one way or the other. My inference would be that at that time — I mean the time of this conference — I was
F. 486 not apprised of the letter of Mr. Ritch to Miss Joyce, if that is the letter which the envelope contained; but even about that I cannot be perfectly clear in my recollection.

52 Q. Had not the letter of Mr. Ritch to Miss Joyce been produced by you and marked in evidence prior to the conference with Mr. Coudert which you had on or about April 30, 1891?

A. I cannot recall as a matter of memory.

53 Q. Did you have the envelope in your possession at any time while the Surrogate's contest was going on?

A. I can add nothing on that subject to what I have already testified.

54 Q. And what have you testified upon that subject already?

A. The record will show.

55 Q. Do you decline to answer the question further than that?

A. I cannot answer the question further.

56 Q. You appear to have some recollection that you have already in your present examination answered the question. Now I ask you what you recollect to have testified on that subject in your present examination?

F. 487 A. I either have testified or have intended to testify that according to the testimony of Mr. Vaughan there was a conversation between Mr. Fayerweather and himself on November 15, 1890, in which something was said upon more institutions for benefit, or put you heads together and find more institutions, or someting of that kind, and that the conversation referred also to some — I remember now that the conversation referred to something about Miss Joyce and about some employees, but that I do not recall that I have testified. As I have said I remember that Mr. Vaughan testified that he made a memorandum about that conversation upon an envelope, and I either have testified or have intended to testify that upon the trial before Judge

F. 488 Truax I used that memorandum for refreshing Mr. Vaughan's recollection or in corroboration of his recollection about the interview in which something was said about more institutions for benefit as testified to by Mr. Vaughan both before the Surrogate and before Judge Truax.

57 Q. Do you intend by your last answer to be understood as testifying that Mr. Vaughan testified before the Surrogate that he wrote upon the back of an envelope anything whatever in connection with anything Mr. Fayerweather said?

A. I do not remember whether he did or not, nor have I intended to testify one way or another about that

particular subject; about the conversation yes, about what was written on an envelope I do not recall, the record will show.

58 Q. The attempt was made in the Surrogate's Court as you understood it to engraft upon the codicil dated November 15, 1890, some secret trust or some resulting trust, was there not?

Mr. Bovee: We object to this question as incompetent. What transpired in the Surrogate's Court is best shown by the record heretofore produced by counsel for
F. 489 the complainants. We further object upon the ground that the matter is immaterial and irrelevant to the issue presented by the special plea.

(At the request of the witness, Question No. 58 was repeated by stenographer.)

A. What counsel means by the term engraft is not clear to me. If he wishes me to state what position was taken by Mr. Coudert and Judge Rollins before the Surrogate I think that I can recall that in a general way.

Mr. Sherman: The question is repeated.

The Witness: I assume that what counsel wishes me to state is what position was taken by Mr. Coudert
F. 490 and Mr. Rollins before the Surrogate.

59 Q. Upon that subject or in that direction only.

A. Upon the subject of a secret trust?

60 Q. And I may state in that connection that when I use the word "engraft" I mean impose, subject to, bring within the operation of.

A. Inasmuch as all of the terms last used by counsel, the situation in a general way was this, the counsel for the executors maintained that —

Mr. Sherman: Without desiring to interrupt you, counsel for complainants insists that the answer already made, being in effect a negative to the question, the question calls for no further answer.

The Witness: I am willing to answer the question, and whatever the counsel may be willing to do is immaterial to me. He cannot make anything an answer to a question except the answer which I give.

61 Q. Are you positive that it was Mr. Coudert who asked the question which elicited from Mr. Vaughan the statement about an interview with Mr. Fayerweather on November 15, 1890, in which he refers to putting their heads together and finding more institutions for benefit?

Mr. Bovee: We object.

F. 491 62 Q. Was it not you who asked that question?

Mr. Bovee: We object to it as incompetent; the record is the best evidence of what transpired. The matter is irrelevant and immaterial to the issue presented by the special pleas.

A. If I am to answer from memory I must give the best answer that I can. The record of course would refresh my recollection and is more to be relied upon probably than my testimony. My recollection is that I did ask in reference to that conversation and that Mr. Coudert did do so also.

63 Q. Is it not true that you introduced the subject and that Mr. Coudert referred to it upon cross examination?

F. 492 Mr. Bovee: We object upon the ground that the witness is called upon to testify as to a record, which record has been heretofore produced by counsel for the complainants, and that as to matters in that record the record is the best evidence; also as irrelevant and immaterial to the issue presented by the special plea.

(At the request of the witness, Question No. 63 was repeated by stenographer.)

A. I object to the term cross examination. The position taken by counsel for the executors was that that subject was not pertinent to the probate contest. If

therefore Mr. Coudert did interrogate Mr. Vaughan upon the subject there is raised the question of whether it was in the nature of a cross examination. My impression is that I did make inquiry of Mr. Vaughan about that conversation and that Mr. Coudert did the same thing. However, I may easily be mistaken about this. The fact that I know is that that conversation came out, and came out by Mr. Coudert, but whether it was by questions put by me or him or both I am not able at this time to recall.

64 Q. In this last answer do you impute to Mr. Frederic R. Coudert knowledge derived from what occurred in open Court in the Surrogate's contest that Mr. Fayerweather had given Mr. Henry B. Vaughan instructions on the morning of November 15, 1890, for a codicil to be prepared, and which instructions are noted upon the back of the envelope which was marked Exhibit OA in the Five College trial?

F. 493

Mr. Bovee: We object to the question as incompetent.

(At the request of the witness, Question No. 64 was repeated by stenographer.)

A. I impute nothing to Mr. Frederic R. Coudert; Mr. Coudert was present and heard what occurred on the Surrogate's contest. Whether the testimony then given by Mr. Vaughan locates the conversation about more institutions for benefit at one time or other on November 15th, 1890, I cannot remember; the record will show: I presume the record will show, I won't be responsible for the record.

F. 494

65 Q. Upon your testifying before Mr. Dayton in the reference which commenced on the first day of November, 1895, and especially on or about the 26th day of December, 1895, were you asked these questions and did you make these answers —

Mr. Parsons: Mr. Sherman, how long do you propose to detain me here: how much longer?

Mr. Sherman: I think it will take some time to conclude your examination, but I am desirous of consulting your convenience in any proper way. If you have any suggestions to make I shall be very glad to meet them if I can.

Mr. Parsons: I am willing to continue until I receive a telephone from my office, if I may then break off.

Mr. Sherman: I do not desire to cause you any personal inconvenience.

Mr. Parsons: It is extremely unlikely that I
F. 495 shall be able to attend here again for an indefinite length of time.

Mr. Sherman: Well, I shall have to insist upon some specific adjournment when we do adjourn. I will continue my question.

65 Q. (Continuing) "Q. Were you not aware at the time of that deed of gift that besides the will and codicils you refer to there were certain memoranda signed by Mr. Fayerweather and in the possession of one of these executors? A. I do not remember where the memoranda were or in whose possession. I know that one that I regarded as of the greatest importance was in my possession.

"Q. What one was that? A. There was a mem-
F. 496 orandum made by Mr. Vaughan in substantially the last interview that he had with Mr. Fayerweather, in which Mr. Fayerweather, according to my understanding, told him that so far as he, Mr. Fayerweather, had any wishes on the subject this residuary estate was to go to other institutions.

"Q. You mean by other institutions other than those on the face of the will and codicils? A. I mean exactly that."

A. As to dates I have no memory, as to exact questions and answers I have no exact memory. I can recall that before Mr. Dayton I did refer to the memorandum

upon the envelope about more institutions for benefit, and inasmuch as I regarded the conversation upon that subject between Mr. Vaughan and Mr. Fayerweather as important, I may very easily have spoken about the memorandum on the envelope as important, and if the stenographer's minutes show that I said so doubtless I did say so.

Mr. Sherman: I move to strike out so much of the answer as begins, "I can recall" to the end, as not responsive.

F. 497 Mr. Bovee: We object.

66 Q. Was the matter embodied in the last question true, Mr. Parsons?

A. The matter, what?

67 Q. The matter quoted.

Mr. Bovee: Counsel for the defendants objects to this question and the matter sought to be elicited as irrelevant and immaterial to the issue presented by the special pleas.

A. It is impossible for me to answer a question of that kind. The matter referred to relates among other things to conversations between Mr. Vaughan and Mr. Fayerweather. Whether such a conversation occurred or not I do not know.

F. 498 68 Q. So far as the matter embodied in those questions and answers refers to you, was that true? It was true, was it not?

A. You will have to read the passage.

69 Q. Here is the record if you desire to refresh your memory by it.

A. No, I do not desire that. I think I remember it sufficiently, so far as my memory serves me at the present time, it is true; "important" is used in the passage incorporated into the question. The memorandum was important in so far as it might assist the memory of Mr.

Vaughan or might corroborate his statement of what occurred between Mr. Fayerweather and himself on November 15, 1890?

70 Q. Did you testify before Mr. Dayton as follows:

"I will answer one branch of the inquiry further, I will make one further statement in answer to the inquiry, that is this, that from the beginning of my connection with the case down to now I have advised my clients that it was right that all con-

F. 499 cerned should have the possession of all evidence, written or oral, which could bear upon the determination of any of the questions which are an issue concerning Mr. Fayerweather's estate. The very so-called memoranda which were put in evidence before the Surrogate were put in evidence as the result of a conference between Mr. Ritch and myself following a conference with the executors in which I took the position that it was not for them to determine what should be done with this estate, it was not for them to decide whether this will should or should not be proved, that was for the Court to determine when all of the evidence that anybody desired bearing upon the subject should be before

F. 500 the Court. Much of that evidence could have been withheld, much of the evidence which has been before the Court in the Amherst College suit could have been withheld, but the position which the counsel for the executors took at the start, and to which they have adhered to the end, was, that their relation to this controversy was of a trust character, that it was for them to give the court all the facts which they knew for the court to decide; and I defy anybody to point to anything from the beginning to the end of this litigation in the way of action on the part of counsel which is adverse to that view."

A. I cannot remember whether I gave that testimony, but I do recall that that was the position that was taken by myself in conferences from time to time, and I recall further that Mr. Coudert requested writings signed by Mr. Fayerweather or written by Mr. Fayerweather which had passed between him and Mr. Vaughan or Mr. Ritch, perhaps others. So far as I am able to recall they were all furnished to him.

71 Q. Do you mean by that to say that you have a positive recollection that he ever saw Exhibit OA
F. 501 before the settlement?

A. I do not. Exhibit OA was not a writing by Mr. Fayerweather nor by anybody, it was a very brief memorandum relating to a conversation to which Mr. Vaughan testified before the Surrogate.

72 Q. Were you asked these questions and did you make these answers in your testimony before Mr. Dayton?:

"Q. The memorandum which you have described here, was it in relation to the codicil made on the dying day of Mr. Fayerweather? A. I have testified to that; the memorandum about other insti-
F. 502 tutions to which I have referred was made on the day of the execution of the codicil by which these gentlemen take —

"Q. Was that the day on which Mr. Fayerweather died? A. My recollection is that that is the testimony. I was not there; how do I know?

"Q. You have said here to-day that all data necessary to reach a just conclusion was then laid before these gentlemen; and I ask you to find any time, any evidence, any place, any proof, that that fact was ever laid before them. A. I presume that the paper to which reference is made is the memorandum as to which I gave full testimony

yesterday, a memorandum that *so far as Mr. Faycreather had wishes* the residuary estate was to go to other institutions. *I attended with that memorandum myself, regarding it as of importance*, in court on the probate trial ready to produce it if it were called for by Mr. Coudert. There was some inquiry in reference to the envelope according to my present recollection *having some bearing on the subject;* I have forgotten what it was. *Mr. Coudert did not ask for the paper* and I retained it
F. 503 in my possession.

"Q. Mr. Coudert did not at that time know there was any such paper? A. I do not know.

"Did you tell him so? A. I do not know why I should tell him so.

"Q. Did you purposely conceal it from him? A. I concealed nothing, I produced everything that was asked for.

"Q. Did you produce that paper at that probate court or produce it to Mr. Coudert or Mr. Rollins at any time before the agreement for this release was signed? A. I had all the memoranda on this probate contest, and as they were called for pro-
F. 504 duced them. That was not called for and it was retained.

Q. "Please to state how Mr. Coudert could know that such a paper was in existence or Mr. Rollins? A. He could have asked if there were other memoranda. I take that back. I decline to answer.

"Q. Did you tell him there were any other memoranda? A. I have already answered as fully as I can.

"Q. Did you try to conceal that other memoranda from him? A. I tried to conceal nothing.

"Q. Did you conceal it from him? A. I did not.

"Q. Did you show it to him? A. I did not volunteer to show it to him.

"Q. Did you let him know it existed? A. I had no conversation that I recall on the subject?

"Did you, in writing Mr. Coudert, let him or Mr. Rollins know of its existence? A. I have no recollection of having had any correspondence with him on the subject of that memorandum or any memorandum except as I have already stated.

"Q. Did you let them know of the conversation
F.505 that Mr. Vaughan testified to as taking place between him and Mr. Fayerweather on the morning of the dying day, in substance that other institutions as to the residue would have to be found, and the money would have to be given to them? Will you swear you ever let Mr. Coudert or Mr. Rollins, let them know anything about that and that they ever knew anything about that until two years after you got those releases? A. I do not recall, but this I do know, I was employed to obtain the probate of these papers offered for probate as the will and codicils of Mr. Fayerweather. Mr. Coudert was the opposing lawyer. I recognized the right
F.506 of Mr. Coudert to any information in the possession of these gentlemen for which Mr. Coudert asked, (but have yet to learn that if Mr. Coudert thought that evidence of which I knew would be favorable to his side of the controversy, I being on the other side, my duty to my clients required that I should endeavor to hurt their case. I understand that my professional duty was just the reverse of that.) Remember, this was the question of the probate contest.

"Q. You were familiar at that time with the duty of a trustee in obtaining a release from the beneficiaries to disclose the fullest information, everything that he knew that would aid that *cestui*

que trust in reaching a determination of how much property belonged to it, and what his duties were in it, were you not? A. I think I shall decline to acquiesce in the statement which is put to me in the form of a question.

"Q. You were not familiar with that principle at that time, were you? A. I think I shall decline to dignify by the name of principle the proposition which the counsel has just embraced in his inquiry.

F. 507 "Q. Did you or did you not know when these releases were obtained that the executors had not, and you as their counsel had not, disclosed all the information that you had in your possession bearing upon the amount of that property or the interest of the widow or nieces in that property? A. I did not.

"Q. Was that memorandum on an envelope, the memorandum you have referred to? A. I do not understand the question.

"Q. Was the memorandum that you have referred to in one sentence of which was "other institutions for benefit?" A. I do not understand the question. I testified time and again yesterday and

F. 508 to-day that there was such a memorandum, and have testified to all I know about it.

"Q. The memorandum in question is one that contained among other sentences the one "other institutions for benefit." A. I have said so a great many times.

"Q. You have said so. Did you produce that at the probate trial? A. The probate had nothing to do with any such inquiry, but I did have that paper on the chance that it might be asked for, and was ready to produce it.

"Q. You had it there on a chance that it might be asked for, and you were ready to produce it.

Did you give any information to the widow and nieces or to their counsel or either of them that there was such a paper in existence? A. I think it is extremely unlikely that I should do so.

"Q. Did you? A. I have no recollection further than I have testified."

Mr. Bovee: Counsel for defendants objects to this question as incompetent, irrelevant and immaterial,
F. 509 the witness being called by the complainants and being their witness for the purpose of this examination, and whether he did or did not testify in a former proceeding is irrelevant and immaterial; and we further object upon the ground that the whole matter is irrelevant and immaterial to the issue presented by the special plea, the record of the testimony given before Mr. Dayton is the best evidence of what was or was not testified to there.

A. I cannot remember whether I gave that exact testimony.

73 Q. Did you testify substantially as embodied in the last question on that occasion?

Mr. Bovee: I make the same objection.

F. 510 A. It is impossible for any witness to give a truthful answer to a question of that kind, it incorporates long passages which it is impossible to keep in the memory, and then asks a summing up question in reference to them. My memory is not of that kind that it enables me to give an answer one way or another upon such a question. I can tell what occurred.

74 Q. Do the statements embodied in that question, so far as they relate to you and your action correctly state the facts of the matter?

Mr. Bovee: We object as irrelevant and immaterial to the issue presented by the special plea, and we object to the question as incompetent.

A. I cannot keep in mind the whole of the question.

Mr. Sherman: I will have to ask the stenographer to read it to you at your convenience.

Mr. Parsons: I suppose I may go now. If the question is written out I will then consider its details and I presume that I can answer.

F. 511

F. 512

FAYERWEATHER
vs.
RITCH,

REYNOLDS
F. 513 *vs.*
RITCH.

COMPLAINANTS' PROOF.

NEW YORK, January 24th, 1901.

Met pursuant to adjournment. Present: The Examiner, Mr. Sherman, Mr. Blaikie, Mr.
F. 514 Parsons, Mr. Bovee, Mr. Fain, Mr. McLaughlin, and a representative of Nash & Jones.

(Mr. Parsons states that instead of his case being first on the calendar of the Circuit Court of Appeals this morning as has been expected, it is the second case on the calendar, and that he is willing to proceed until his case is called.)

(At the request of counsel, Question No. 154 was repeated by stenographer.)

Continuation of the examination of *JOHN E. PARSONS.*

The Witness: Having heard read over the statement to which the last question applies, I am now willing to answer it if you desire.

By Mr. Sherman:

155 Q. I desire, if you please, that you should state whether you gave that testimony in answer to those questions on the occasion referred to?

Mr. Bovee: Counsel for the defendants objects to
F. 515 the question as irrelevant and immaterial to the issue presented by the special plea, and the record of the testimony given in the proceeding from which the testimony is read is the best evidence of what was testified to by the witnesses there.

A. To that question I can add nothing to that to which I have already testified. It is impossible for me, after an interval of years, to recall verbatim what may have been asked or what may have been answered on the occasion referred to. I can state my recollection of the testimony which I gave if you desire.

156 Q. Was the deed of gift executed on the 24th of February, 1891?

Mr. Bovee: Counsel for defendants objects as
F. 516 incompetent, the deed of gift is the best evidence of when it was executed, and the testimony sought to be elicited is irrelevant and immaterial to the issue presented by the special plea.

A. At or about that time, I cannot remember as to the exact date. I presume that the execution by the several parties followed the date of the instrument.

157 Q. Were you not aware at that time that besides the will and codicils offered for probate in the Surrogate's Court in that proceeding there were certain memoranda signed by Mr. Fayerweather in the possession of one of the executors?

Mr. Bovee: Counsel for the defendants objects to that

as irrelevant and immaterial to the the issue presented by the special plea.

(At the request of the witness, Question No. 157 repeated by the stenographer.)

A. I was aware that there were certain memoranda as to which it was stated that they had been signed by Mr. Fayerweather, but I am not aware that at that time they were in the possession of one of the executors.

F. 517 My recollection would be they had been — my recollection is that the memoranda of which I know or was informed were put in evidence upon the probate trial, but just exactly at what stage of the trial I can only tell by reference to the record.

158 Q. Upon their being marked in evidence were they not returned to you as counsel for the executors?

A. They were not returned to me so far as I can recall. The practice of the Surrogate's Court is to retain exhibits, and I assume they were retained by the Surrogate's Court.

159 Q. Have they been there ever since, in your opinion?

A. I have no knowledge upon the subject; my only inference is from the practice of the Surrogate's

F. 518 Court which is that after the decision of a case the exhibits are returned, but until then they are retained by the Surrogate.

160 Q. How long is it since the decision in that case was rendered?

A. I do not remember the date of the decision.

161 Q. Well, it is over ten years, is it not, or about ten years?

Mr. Bovee: We object as incompetent, irrelevant and immaterial; the decision of the Surrogate and the record in the Surrogate's Court is the best evidence as to when that decision was rendered; and as irrelevant and immaterial to the issue presented by the special plea.

A. My recollection is that the decision of Surrogate Ransom as first given related to the will, and that his decision about the codicils came later. I do not think that the entire decision was as of one time. Dates I cannot recall.

162 Q. But according to your statement of the practice, the decision of the whole matter by the Surrogate was so long ago that in the course of practice as stated by you these exhibits would have been returned to your clients or yourself, is it not so?

F. 519 A. It is not so. The exhibits to which I have referred were in the immediate custody of Messrs. Arnoux, Ritch & Woodford; I had no personal custody of them; and in natural course after the close of the Surrogate's trial they would go back to those gentlemen rather than would they come back to me. I have no recollection that they ever came back to me.

163 Q. Among the memoranda was there one that you regarded as of the greatest importance, and which was in your possession.

Mr. Bovee: We object to that as irrelevant and immaterial to the issue presented by the special plea, and as incompetent as calling for the opinion of the witness.

F. 520 (At the request of the witness, Question 163 was repeated by stenographer.)

A. There was not in my possession any memoranda which I regarded as of importance applicable to the probate contest.

164 Q. Did you not testify in the Dayton reference: "A. I do not remember where the memoranda were or in whose possession, I know that one that I regarded as of the greatest importance was in my possession"? In connection with the question I state to the witness that if he desires it I will produce to him the record of his testimony in the Dayton record to refresh his memory.

Mr. Bovee: Counsel for the defendants objects on the ground that the testimony now in the possession of the counsel for the complainants is the best evidence of what the witness testified to in that case, and objects to the matter as irrelevant and immaterial to the issue presented by the special plea.

(At the request of the witness, Question No. 164 was repeated by stenographer.)

F. 521 A. I can only say what I have heretofore said, that whether I gave that exact testimony I cannot recall. I do know that I was a witness upon the Dayton reference about other matters, and that occasion was taken to ask me general questions, and reference was made to the envelope which has been spoken of as having been marked upon the Truax trial OA, and I can remember that I thought at the time, and I presume I testified, that there was one aspect of the situation in respect of which I regarded that as of importance, not, however, as having any bearing upon the probate contest. Its importance was in enabling Mr. Vaughan to refresh his recollection with reference to a conversation which he testified to have taken place between Mr. Fayerweather and
F. 522 himself on November 15th, 1890, which conversation he testified to upon the probate trial and also upon the trial before Judge Truax if my memory serves me correctly.

Mr. Sherman: I move to strike out that part of the answer commencing, "I do know," and continuing to the end, as not responsive.

Mr. Bovee: We object to the striking out of the testimony.

165 Q. Was that a memorandum made by Mr. Vaughan in substantially the last interview that he had with Mr. Fayerweather in which Mr. Fayerweather, according to your understanding, told him that so far as Mr. Fayer-

weather had any wishes on the subject this residuary estate was to go to other institutions.

Mr. Bovee: Same objection.

A. My only knowledge upon the subject consists of what Mr. Vaughan testified to. My recollection is that Mr. Vaughan, on the two occasions to which I have referred, testified to a conversation with Mr. Fayerweather on November 15th, 1890, in which reference was made to other institutions or other institutions for benefit, or put your heads together and find other institutions,

F. 523 or some expression of that kind, and that Mr. Vaughan testified that he put down the words, "Other institutions for benefit," or something of that kind, upon the back of an envelope which I assume to be the envelope referred to.

166 Q. Is it not true that Mr. Vaughan testified in the probate proceeding that after the execution of the codicil of November 15th, 1890, he had an interview with Mr. Fayerweather in which Mr. Fayerweather said in substance that they must put their heads together and find other institutions for benefit, and was not that all that Mr. Vaughan testified to on that subject in the Surrogate's contest.

F. 524 (At the request of the witness, Question No. 166 was repeated by stenographer.)

A. Whether that was all that was testified to by Mr. Vaughan upon that subject I cannot, of course, recall. That he did testify to that effect I do remember. Whether he testified that the conversation was before or after the execution of the codicil of November 15th, 1890, I do not distinctly remember. All upon that subject which at the present time I can recall is the different positions taken upon the Truax trial about that conversation, on the one side by the counsel for the colleges, on the other side by the counsel for Mr. Reynolds. That

leaves an impression upon my mind with reference to the period when Mr. Vaughan testified that he had this conversation.

Mr. Sherman: I move to strike out that part of the witness which begins "All upon that subject which at the present time I can recall is the different positions taken," and continuing to the end, as not responsive.

Mr. Bovee: I object to striking out anything.

The Witness: I, as witness, submit that if counsel proposes to take objections to answers his duty is
F. 525 to do it when the answer starts and not wait until he has heard the answer.

Mr. Sherman: Counsel for the complainants states that he is not sufficiently a prophet to anticipate before the answer is given that the answer will not be responsive to the question, and he is, therefore, under the necessity of moving to strike out what it transpires, is not responsive, after he has learned in the only manner that is possible, that it is not responsive.

167 Q. Is it not true that upon giving his testimony upon the trial before Judge Truax in the Five College action Mr. Vaughan changed the version given by him concerning the conversation concerning more institutions for benefit as it had been given in the Surrogate's
F. 526 contest by placing it on the morning of November 15th and prior to the execution of the codicil and by then representing that it was incident to instructions which he had in the morning received from Mr. Fayerweather concerning the codicil to be executed, and that he took down the headings and substance of those instructions upon this envelope; and is it not true that that version of the interview concerning more institutions for benefit was first given by Mr. Vaughan in the court upon the trial of the Five College action and not upon the Surrogate's contest?

Mr. Bovee: Counsel for defendants objects to the question upon the ground that the record in the probate

proceedings is the best evidence of what was testified to by Mr. Vaughan there, and the record in the Five College action is the best evidence of what Mr. Vaughan testified to there. The question calls for the conclusion of the witness. Also upon the ground that the whole matter called for by the question is immaterial and irrelevant to the issues created by the special plea; also upon the ground that the whole line of the examination is in the nature of a cross examination of a witness called by the complainants.

F. 527 A. Words or language I cannot remember. My recollection is that so far as substance went what Mr. Vaughan testified to upon each action is the same. About the period of time, I have many times said that I have no present memory.

168 Q. Did you testify in the Dayton reference that the memorandum about other institutions to which you had referred was made on the day of the execution of the codicil by which these gentlemen take?

Mr. Bovee: Counsel for the defendants objects to the question as incompetent; the record in the Dayton reference now before the counsel is the best evidence of what the witness testified to. The whole matter is immaterial and irrelevant to the issue presented by the special

F. 528 plea.

Mr. Sherman: Counsel for the complainants objects to the statement of fact embodied in the objection last made wherein it states that the record in question is now before the counsel because that statement is untrue.

(At the request of the witness, Question No. 168 was repeated by stenographer.)

A. I do not think that I could have testified so, that would assume that I had knowledge upon the subject. I had no knowledge upon the subject.

169 Q. Will you say positively that you did not so testify?

A. I have no recollection upon the subject one way or the other.

170 Q. Did you attend upon the trial of the case before the Surrogate with that memorandum OA in your possession ready to produce it if it were called for by Mr. Coudert?

Mr. Bovee: Counsel for defendants objects upon the ground that the matter is irrelevant and immate-
F. 529 rial to the issue presented by the special plea.

A. My recollection would be that either I or somebody had the letter which is assumed to have been contained in the envelope, and I take it for granted that the envelope was with it. Upon this subject it is impossible for me, after an interval of over nine years, to testify with confidence, but my memory would be that I did have the letter and the envelope. In fact I have a recollection that some question arose about date and that the envelope was referred to to fix the date.

171 Q. Was referred to — do you mean by that that it was produced and exhibited by you?

A. No, I do not mean that. That depends upon the signification which attaches to the word "ex-
F. 530 hibited." My recollection is that it was there and that reference was made to it on this subject of a date, but just exactly in what connection or how I do not recall.

172 Q. Do you mean to say that reference was made to it by any one who was conscious at the time that it was actually in court excepting yourself?

A. I cannot speak about the consciousness of other people.

173 Q. Can you state any fact which seems to you to indicate, or from which you derive an impression in your memory, that those who spoke of it were aware that this envelope was then in court, excepting yourself?

Mr. Bovee: Counsel for defendants objects as irrelevant and immaterial and incompetent, and irrelevant to the issue presented by the special plea; as to what transpired upon the probate proceeding, that is best evidenced by the record of the trial.

(At the request of the witness, Question No. 173 was repeated by stenographer.)

A. All I can remember is that some reference was
F. 531 made to a date and that the envelope was referred to as fixing a date, but by whom or what occurred further in reference to it, I do not recall. I presume that the record will show.

174 Q. Was not the only reference to the envelope as fixing the date a statement in substance that if the envelope were produced it would fix the date, and that the suggestion was made that it should be produced, whereupon Mr. Arnoux and yourself at once made the concession about the date in dispute and did not produce the envelope?

Mr. Bovee: Counsel for defendants objects that the record of the Surrogate's trial is the best evidence of what occurred there, and the matter is irrelevant and
F. 532 immaterial to the issue presented by the special plea.

A. So far as I recall, the production or non production of the envelope had nothing to do with the concession about the date. What occurred and what was said by me and what was said by Mr. Arnoux I presume that the record will show.

Mr. Sherman: The question is repeated.

The Witness: I can make no other answer.

175 Q. The fact is, Mr. Parsons, that on that occasion when this date was spoken of and this envelope was referred to as something that would fix the date, you had that envelope in your pocket in court, did you not?

A. Not that I remember.

176 Q. Well what did you mean, then, by testifying before Mr. Dayton that you attended with that memorandum yourself, regarding it as of importance, in court on the probate trial ready to produce it if it were called for by Mr. Coudert?

Mr. Bovee: Counsel for the defendants objects to the question as assuming something that has not been proven. We object to the matter as irrelevant and immaterial to the issue presented by the special plea.

F. 533 A. If that is a correct statement of what the stenographer's minutes show to have occurred, I meant exactly what I said. Mr. Coudert on the probate contest raised the question of whether there was or was not a secret trust; the position of the counsel for the executors was that that was not an issue on the probate proceeding, that the only issue there was will or no will, but as the Surrogate might hold that the question of Mr. Fayerweather's wishes was before him, and inasmuch as the conversation of the 15th of November, 1890, between Mr. Vaughan and Mr. Fayerweather might bear upon that subject, I was there among other things to have Mr. Vaughan state what occurred if necessary, and if question were made about it, or if it were necessary to

F. 534 corroborate his testimony, to refer to the memorandum "other institutions for benefit" which was unintelligible without his testimony.

Mr. Parsons: I am now called to the Circuit Court of Appeals.

The further examination of Mr. Parsons is postponed by reason of his engagement in the Circuit Court of Appeals.

MORITZ ELLINGER, re-called for further examination, testified as follows:

By Mr. Sherman:

4 Q. Mr. Ellinger, have you now brought here from the Surrogates' Office of the County of New York
F. 535 the original will and the four codicils admitted to probate of Daniel B. Fayerweather?

A. I have.

Mr. Sherman: I ask to have them marked in evidence.

The will was marked Complainants' Exhibits, No. 1, January 24, 1901, C. B.

The first, second, third and fourth codicils were marked respectively Complainants' Exhibits, Nos. 2, 3, 4 and 5, January 24, 1901, C. B.

Mr. Sherman: You may cross examine this wit-
F. 536 ness, Mr. Bovee.

Cross examination by Mr. Bovee:

5 XQ. Were you subpœnaed to produce these papers here yesterday?

A. Well, the Clerk of the Court was.

6 XQ. Have you that subpœna with you.

A. No, sir, I have not.

7 XQ. How do you know the Clerk of the Court was subpœnaed to produce these papers yesterday?

A. Well, there are a number of officers in that room, and the one who can best leave, he takes those papers and there is no further questions about it. I do not know whether there had been any special subpœna served. Merely when I was here yesterday and found that the will was not along with the papers, I got the key from the clerk who had that will locked up and took the will out and produced it here.

8 XQ. Who was the clerk who had that will locked up?

F. 537 A. Thomas M. Marsac.

9 XQ. Locked up in the safe in the office?

A. Yes sir; he was sick; he is still sick.

10 XQ. Were you requested to bring that will and codicils here yesterday?

A. When I was here I was requested to do so.

11 XQ. Had you been requested to bring them here before you came here?

A. Oh, yes, certainly, I was requested when I was here yesterday to produce other papers, I was requested right here in court. When it was found that the will and codicils were not with the papers I was requested to look for them and bring them here.

F. 538 12 XQ. Had you been told before that, to bring them with these other papers?

A. No, sir; these other papers were taken back.

13 XQ. You never have been subpœnaed to produce these papers?

A. No, sir; I have not. You see, there were hearings here —

Mr. Sherman: If you will just answer the questions, Mr. Ellinger, we will get through quicker.

The Witness: Well, I will.

Mr. Bovee: That is all.

MORITZ ELLINGER.

Sworn to before me this 18th day of February, 1902.

JOHN A. SHIELDS,
Examiner.

F. 539

F. 540

TESTIMONY OF W. L. DRUMMOND.

WILLIAM L. DRUMMOND, re-called for further examination on behalf of the complainants, testified as follows:

By Mr. Sherman:

25 Q. Mr. Drummond, I now show you the will
F. 541 and the four codicils of D. B. Fayerweather produced by the last witness and marked Complainants' Exhibits 1, 2, 3, 4 and 5 of this date, and I ask you whether you photographed any part of those papers, and when.

A. I did, sir, on December 6th, 1900.

26 Q. Now will you state in what manner you performed that process?

A. I obtained a table in the Surrogates' Court, placed my camera on the table, put the signature behind a plate glass, truing the signature to the table, squared them, then placed my camera in a like parallel position, in which position I made photographs of the five signatures at once.

F. 542 27 Q. Of the five signatures of those papers?

A. To those papers.

28 Q. (Handing card) Look at the card which I now hand you which appear to be pasted or mounted five photographic imprints, apparently, and state whether those are the ones you made.

A. Those are the ones I made at that time.

29 Q. Are those accurate and truthful reproductions of the signature to those five papers?

Mr. Bovee: Counsel for defendants objects to the question as incompetent, and objects to the matter as irrelevant and immaterial to the issue presented by the special plea.

A. They are.

Mr. Sherman: I offer the card and the photographs in evidence.

Mr. Bovee: Counsel for defendants objects on the ground that the matter is immaterial and irrelevant to the issue presented by the special pleas.

The card was marked Complainant's Exhibit, No. 6.

(See Exhibit 81 in Appendix of Exhibits.)

30 Q. Did you also photograph the endorsements
F. 543 of the codicil dated November 15, 1890?

A. I did.

31 Q. In the same manner as you photographed the signatures on the five papers?

A. No, sir; that was photographed at the office of Mr. Drummond, at 50 Fulton Street; it was placed in a frame—

Mr. Bovee: One moment. I object to what somebody else has done.

The Witness: I did it. I photographed the back of the codicil.

32 Q. (Handing paper) There is the codicil of November 15 produced by Mr. Ellinger, Exhibit 5.

A. Yes, sir; I photographed that at the office of Mr. Drummond, 50 Fulton Street; it was placed
F. 544 frame behind a plate glass upon a plain board which was parallel to the camera or the lense, and of which this is a true and correct photograph. This was made on December 20, 1900.

33 Q. Referring to the mounting on the card you hold in your hand? A. Yes, sir.

Mr. Sherman: I now offer that card and the print thereon in evidence.

Mr. Bovee: We object to it as irrelevant and immaterial to any issue presented by the special plea.

The card was marked Complainants' Exhibit, No. 7, January 24, 1901, C. B.

(See Exhibit 82 in Appendix of Exhibits.)

34 Q. Did you also take an enlarged photograph of the signature to the codicil dated November 15, 1890, which has been marked Complainants' Exhibit 5, January 24, 1901?

A. I did, yes, sir.

35 Q. Will you state in what manner you made that enlarged photograph?

A. I enlarged the signature a number of times.

36 Q. In what manner, I say, did you enlarge it?

A. The signature was placed behind a plate glass in a frame against a plain board which was parallel

F. 545 to the camera, and enlarged a number of times on a negative.

37 Q. Parallel to the camera?

A. Parallel, yes, sir.

38 Q. Well, go on.

A. Which negative was again enlarged a number of times to obtain an enlarged print, of a larger size, which was made in the camera.

39 Q. Did the plate from which the print was made receive the direct image from the signature?

A. It did.

40 Q. From the paper itself and not from any other plate?

F. 546 A. It was made direct from the first negative, there was only one negative made.

41 Q. It was made from the negative?

A. From the negative, the original negative.

42 Q. You mean the negative, a print from which is upon the Complainants' Exhibit 62 and in the middle signature from top and bottom of Daniel B. Fayerweather?

Mr. Bovee: One moment. Counsel for defendants objects upon the ground that the matter is irrelevant and immaterial to the issues presented by the special plea. We object to the whole matter as irrelevant, immaterial and incompetent in any aspect of the case, and the

original instruments having been offered in evidence and being before the Court.

(At the request of the witness, Question No. 42 was repeated by stenographer.)

A. That signature—

43 Q. The signature on Complainants' Exhibit for identification January 23, 1901, is that the one you mean by that signature?

F. 547 A. Yes, sir.

44 Q. Well, go on.

A. Is identical to the signature marked 5 on Complainants' Exhibit 6.

45 Q. Well, that is the middle one, is it not?

A. Yes, sir. But that enlargement was not made from this plate.

Mr. Bovee: I move to strike out the answer of the witness as incompetent.

46 Q. Now please attend to the question. What object was in front of the lense at the time the plate was exposed, from which plate was printed Complainants' Exhibit for Identification, January 23, 1901?

Mr. Bovee: We object to the matter as irrelevant

F. 548 and immaterial to the matter presented by the special plea, and as incompetent, the originals from which the alleged photographs are taken already in evidence and before the Court.

(At the request of the witness, Question No. 46 was repeated by stenographer.)

A. There was nothing in front of the lense except the plate glass and this signature which is the middle signature on Complainants' Exhibit, No. 6.

47 Q. You mean by that, that the original paper, the

codicil dated November 15, 1890, that the signature was in front of the lense at that time?

A. Covered by a plate glass.

48 Q. Then the enlarging process was not something done by taking a plate and enlarging the image from that or by projecting the image from that upon some screen or otherwise, it was a direct photograph from the codicil itself, was it?

Mr. Bovee: We object to the question as leading; we object to the matter sought to be elicited as irrele-
F. 549 vant and immaterial to the issue presented by the special plea. The original will and codicils being before the Court and in evidence, the matter has no relevancy to the issue at large.

A. No.

49 Q. Complainants' Exhibit for Identification, January 23, 1901, is a print from an exposed and developed photograph plate, is it not?

Mr. Bovee: We object to the question as leading and as incompetent and as calling for the opinion of the witness as to a paper which is not in evidence.

A. Yes, sir.

50 Q. And that plate by that exposure received upon it an image which became fixed by the process of
F. 550 developing, is that right?

Mr. Bovee: Same objection.

A. Yes, sir.

51 Q. Now I wish you would state what the object was, the image of which was received upon the plate from which Complainants' Exhibit for Identification, January 23, 1901, was printed.

Mr. Bovee: Same objection.

A. Complainants' Exhibit 5, the signature of D. B. Fayerweather, was brought to the office of A. J. Drummond—

52 Q. Do not talk about something else. Answer the question. We do not want all this.

A. I would like to give you the mode.

53 Q. I would like to have you answer my questions.

A. I cannot answer it in the way it is given.

54 Q. Anybody can answer it. Hear it read.

Mr. Bovee: We object to the dictation of the counsel to the witness.

A. I enlarged D. B. Fayerweather's signature on Complainants' Exhibit 5 on one plate, which in turn was enlarged to the Complainants' Exhibit for Identification was obtained.

F. 551

(At the request of counsel last answer read.)

Mr. Sherman: I ask that the original question be read.)

(Question No. 51 repeated by stenographer.)

Mr. Bovee: Defendants' counsel object on the ground that the matter is irrelevant and immaterial to the issue presented by the special plea, as incompetent, relating to a paper which has not yet been put in evidence, and the original will and codicils being now in evidence and before the Court, the whole matter is of no conse-

F. 552 quence and is immaterial.

(At the request of the witness, Question No. 51 was repeated by stenographer.)

The Witness: The object was the signature of D. B. Fayerweather on Complainants' Exhibit 5.

55 Q. Where was the signature of Complainants' Exhibit 5 at the time the plate was exposed in the camera.

Mr. Bovee: Same objection.

A. It was in a frame behind a plate glass against a plain board which was parallel to the lense and the camera.

56 Q. I would like to know whether the image which was received upon the plate from which Complainants' Exhibit for Identification of January 23, 1901, was printed, was the direct image of the signature D. B. Fayerweather upon the paper Complainants' Exhibit 5, January 24, 1901.

Mr. Bovee: Same objection.

(At the request of the witness, Question No. 56 was repeated by stenographer.)

F. 553

A. It is a direct photograph of the signature by the medium of the negative.

57 Q. Well, when you speak of having enlarged it several times, what do you mean by that?

A. I made a negative smaller than this photograph first.

58 Q. Well, what did you do next?

A. I placed that negative in an enlarging camera before the lense and enlarged it to a screen behind the lense from which Complainants' Exhibit for Identification was received.

59 Q. Then do you mean to be understood that the plate from which the exhibit for identification

F. 554 was printed is a plate, the result of photographing another plate?

A. There was no plate of that size, the plate of that was a smaller size which was enlarged directly on paper.

60 Q. Well, will you explain step by step the process by which you produced the plate from which the exhibit for identification was printed, commencing with the signature D. B. Fayerweather upon Complainants' Exhibit 5, January 24, 1901?

Mr. Bovee: Counsel for defendants objects to the testimony as irrelevant and immaterial to the issue presented by the special plea, and as immaterial and incompetent,

the original from which the alleged photograph was taken being already in evidence and before the Court.

A. The signature of D. B. Fayerweather of Complainants' Exhibit 5 was placed behind a plate glass in a frame against a plain board parallel to the camera and the lense; it was enlarged —

61 Q. Do you mean parallel to the lense or at right angles to the lense?

A. Right angles and parallel. It was enlarged several times on a negative, which negative was again
F. 555 enlarged in the camera, all parts being at right angles and parallel to the signature of D. B. Fayerweather, Complainants' Exhibit for Identification.

62 Q. Is then the plate from which the Complainants' Exhibit for Identification was printed the result of a usual and common photographic process for the enlargement of objects?

A. Yes, sir.

63 Q. Does it preserve its integrity, the relative proportions of the parts in the enlarged form?

Mr. Bovee: Counsel for the defendants objects to the question as incompetent, and as immaterial, and as irrelevant and immaterial to the matter presented by the special plea.

F. 556 A. It does.

64 Q. You say that the object was placed at right angles and parallel to the lense. Explain what you mean by that.

Mr. Bovee: Same objection.

A. The camera is built on a swinging platform upon which is erected a board which is at right angles to the swinging bed or platform; upon that platform, sliding on a V-edge, is a telescopic camera which is also at right angles and parallel to the bed, and at right angles and parallel to the plain board, the object of which is to prevent any distortions in any way shape or manner, having all points true.

65 Q. Well, in this process and in the adjustment of the object to the camera in the development and enlargement of the figure and the plates, have you followed the usual and scientific method of making and developing an enlarged object from a smaller plate?

Mr. Bovee: We object to the question as incompetent, and we object to the matter sought to be elicited as irrelevant and immaterial to the issue presented by the special plea; and the originals from which the alleged photographs were made being already in evidence, the matter is of no earthly consequence.

F. 557 A. I have.

Mr. Sherman: I now offer in evidence the print marked for identification yesterday, and ask to have it marked Complainants' Exhibit 8.

Mr. Bovee: Counsel for the defendants objects upon the ground that the matter is irrelevant and immaterial to the issue presented by the special plea. The paper is incompetent, not being fully shown to be an accurate and correct reproduction of the signature upon the paper, the codicil; that the will and codicils being already in evidence and before the court, it is immaterial.

The print was marked Complainants' Exhibit, No. 8, January 24, 1901, C. B.

(See Exhibit 83 in Appendix of Exhibits.)

F. 558 Mr. Sherman: You may cross examine, Mr. Bovee.

Cross examination by Mr. Bovee:

66 XQ. How long have you been in the business of photography?

A. Since 1884.

67 XQ. In this city?

A. Yes, sir.

68 XQ. And all of that time taking photographs?

A. Well, the first four years I alternated between school and photographing.

69 XQ. The first four years?

A. The first four years to 1888; from 1888 on, continuously.

70 XQ. Are you in business for yourself?

A. I am not.

71 XQ. With whom are you associated?

A. I am in the employ of Mr. A. J. Drummond, 50 Fulton St.

F. 559 72 XQ. Any relation of yours?

A. My father.

73 XQ. Is your business that of taking photographs of signatures exclusively?

A. No, sir.

74 XQ. Have you ever had any experience of taking photographs of signatures before this that you have related here?

A. A great deal.

75 XQ. When did you begin that?

A. About 1884; I assisted.

76 XQ. You assisted your father?

A. Yes, sir.

77 XQ. I understand you to say that you took
F. 560 the photographs shown upon Complainants' Exhibit, No. 6?

A. Yes, sir.

78 XQ. And I understand you to say that the signatures shown upon that exhibit are exact reproductions of the originals from which the photographs were taken?

A. They are.

79 XQ. You swear to that, do you?

A. Yes, sir.

80 XQ. Positive about it?

A. As near as I can be, yes, sir.

81 XQ. (Handing paper) Look at the paper Complainants' Exhibit 5 of this date, being the codicil dated the 15th day of November, 1890, and tell me if you see upon that paper the signature of D. B. Fayerweather?

A. Yes, sir.

82 XQ. And what do you see opposite that signature?

A. A seal.

83 XQ. What is the color of that seal?

A. Red.

84 XQ. About what is the diameter of that seal?

F. 561 A. About three-eighths of an inch.

85 XQ. Do you observe that any part of the signature D. B. Fayerweather runs into and across any part of the seal? A. Yes, sir.

86 XQ. Clearly and distinctly so, is it not?

A. Yes, sir.

87 XQ. Look at Exhibit 6 of this date, January 24, 1901— (See Exhibit 81 in Appendix of Exhibits.)

Mr. Sherman: I move to strike out the last answer of the witness, that the signature of D. B. Fayerweather upon the seal is clear and distinct, as not cross examination and on the ground that we have not called this witness as an expert in handwriting, but only as a photographic expert, and otherwise as incompetent,

F. 562 irrelevant and immaterial.

88 XQ. Now look at Exhibit 6 of this date and indicate to me which of the signatures D. B. Fayerweather upon that exhibit is the photograph of the exhibit which you now hold in your hand, Exhibit No. 5 of Complainants? (See Exhibit 81 in Appendix of Exhibits.)

A. The middle one, No. 5.

89 XQ. The third one from the top, is it not?

A. The third one from the top.

90 XQ. Look at the third signature shown upon Exhibit No. 6 (See Exhibit 81 in Appendix of Exhibits) and tell me what you see opposite the signature D. B. Fayerweather?

A. A seal.

91 XQ. And what is the color of that seal?

Mr. Sherman: Objected to upon the ground that the exhibit being in evidence speaks for itself.

A. It is a photographic sepia.

92 XQ. What is the color of that seal?

A. Photographic sepia.

93 XQ. Well, what does that mean, black or white?

A. No, it is a photographic color.

94 XQ. Is it red?

F. 563 A. No, sir.

95 XQ. To the ordinary visual observation it is black, is it not?

Mr. Sherman: Objected to as incompetent and as a matter of expert opinion, not ordinary opinion to be determined without the assistance of expert opinion.

A. I cannot say that it is black.

96 XQ. Well, it looks black, does it not?

A. Not to me.

97 XQ. Not to you?

A. No, sir.

98 XQ. You see it from the standpoint of a scientific photographer, is that right?

A. I cannot help but see it in that way.

F. 564 99 XQ. Very well. Look at the signature D. B. Fayerweather and tell me if you see any part of the signature going across the seal as in Exhibit 5. (See Exhibit 81 in Appendix of Exhibits.) A. I do not.

100 XQ. And it is not there, is it?

A. It is there, but I cannot get it; the conditions under which I photographed this signature at that time were very unfavorable to photographing red and black.

101 XQ. It does appear in Exhibit 5, the original, (See Exhibit 81 in Appendix of Exhibits) that signature does run across part of the seal, does it not?

Mr. Sherman: Objected to on the ground that the exhibit being in evidence will speak for itself.

A. There are lines on it, whether it is the signature or not I do not know.

102 XQ. Do those lines which you now refer to appear upon Exhibit 6 (See Exhibit 81 in Appendix of Exhibits) the photograph in evidence?

Mr. Sherman: Objected to upon the ground that the exhibit being in evidence will speak for itself.

A. They do not.

103 XQ. Where were the photographs shown upon Exhibit 6 taken?

F. 565 A. In the Surrogates' Court.

104 XQ. In the Surrogates' Court? A. Yes, sir.

105 XQ. When?

A. On December 6, 1900.

106 XQ. By you?

A. By me.

107 XQ. What kind of a day was that?

A. A dark, foggy, rainy, drizzly day.

108 XQ. Where was the photograph taken shown upon the Complainants' Exhibit 7 of this date?

A. At Mr. Drummond's office, 50 Fulton Street.

109 XQ. When?

A. December 20, 1900.

110 XQ. Then you had in your possession at Mr.

F. 566 Drummond's office in Fulton Street the original paper. Complainants' Exhibit 5 (See Exhibit 81 in Appendix of Exhibits) on that date, did you?

A. I had not, it was in the possession of a clerk from the Surrogates' Office; he handled it, I had nothing to do with it.

111 XQ. Was the clerk there all the time?

A. He was.

112 XQ. And remained while the paper was there?

A. Yes, sir; very close to the paper.

113 XQ. And took it away, did he?

A. Yes, sir; and took it with him.

114 XQ. What time in the day was that?

A. Twelve o'clock.

115 XQ. What was the name of that clerk?

A. I do not know. I would know it if I heard it, I believe.

116 XQ. Was it Marsac?

A. I think that is the name.

117 XQ. Has this paper ever been in your possession?

A. No, sir.

118 XQ. Have the other papers, the will and codicils which have been offered in evidence here and F. 567 of which you say you took photographs of the signatures, ever been in your possession?

A. No, sir.

119 XQ. How long did that codicil, Complainants' Exhibit 5, remain in your office upon that day?

A. Between a half hour and three-quarters of an hour.

120 XQ. What kind of a day was it upon which you made that photograph?

A. The most favorable of days, bright, clear sunshine, not a cloud.

121 XQ. A clear sunshine day without any cloud is favorable to a photograph, is it?

A. Yes, sir; very.

F. 568 122 XQ. Well, the day and the circumstances existing under which you took the photograph Exhibit 6, (See Exhibit 81 in Appendix of Exhibits) were very unfavorable?

A. Yes, sir.

Mr. Bovee: I think that is all.

Re-direct examination by Mr. Sherman:

123 RDQ. Mr. Drummond, in taking a photograph of a writing in an interior, in a house, is it not true that the brightness of the day is important.

A. Very.

124 RDQ. Wait a moment—chiefly with reference to the time of the exposure?

That is the question.

A. The length of exposure does not make up for the quality or quantity of light.

125 RDQ. Then would a long exposure upon a day when the sun is obscured, either by cloud or rain or snow, produce an accurate image upon the plate of the object in front of it, that is to say, such an object as a flat paper with a writing upon it?

F. 569 Mr. Bovee: We object to that question as incompetent and leading.

A. For ordinary writing it makes little difference, but when it comes down to colors, it makes a great difference.

126 RDQ. Does it make any difference as far as regards the reproduction of writing upon a flat surface, aside from questions of color?

A. No, sir.

127 RDQ. So far as the reproduction of the signatures upon Complainants' Exhibit 6 (See Exhibit 81 in Appendix of Exhibits) were concerned, was the day on which they were taken such, in connection with the length of the exposure, as to produce an accurate and true

F. 570 reproduction of the signatures?

Mr. Bovee: We object to that question as incompetent and as calling for the conclusion of the witness and we object to the matter as irrelevant and immaterial to the issue presented by the special plea.

A. The light was favorable for photographing a signature on a flat surface on such a day irrespective to the time of exposure.

128 RDQ. Is the only difference between the kind of day when Complainants' Exhibit 8 (See Exhibit 83 in Appendix of Exhibits) was taken, and the kind of day when Complainant's Exhibit 6 (See Exhibit 81 in Appendix of Exhibits) was taken, so far as its photographic importance

is concerned, one relating to the development of the red seal, or is there some other feature which is affected by the difference in the days?

Mr. Bovee: We object to the question as incompetent and as leading, and as irrelevant and immaterial to any issue presented by the special plea, and the original will and codicils being in evidence before the Court, the whole matter is immaterial.

A. Aside from the conditions of the day, I prepared a plate which was especially adapted to

F. 571 photographing the spectrum of black on red.

129 RDQ. Has that anything to do with the appearance of the writing upon the seal upon Complainants' Exhibit 8 (See Exhibit 83 in Appendix of Exhibits) of this date?

A. In connection with the sunlight, the preparation of the plate, it has everything.

F. 572

Continuation of the examination of *JOHN E. PARSONS.*

By Mr. Sherman:

177 Q. When you said in your testimony before Mr. Dayton, "I attended with that memorandum myF. 573 self," did you mean that you had in your own physical possession in the Surrogates' Court the envelope Exhibit OA?

A. If I made that statement, that is what I must have intended. Your previous question asked whether it was in my pocket.

178 Q. Did that memorandum on the back of Exhibit OA in lead pencil read as follows, according to your recollections: "Clause about Miss Joyce, about the men being with him, more institutions for benefit, Mrs. Beardsley's amount $100,000 in bonds, strike out about servants in his employ"?

A. Something of that kind.

179 Q. The inquiry in reference to the envelope in F. 574 the Surrogates' contest arose, did it not, substantially in this way: Mr. Vaughan had testified in substance that Mr. Fayerweather had not been shown a letter written by Mr. Ritch to Miss Joyce, Miss Amelia Joyce, in which letter Mr. Ritch makes some statement about his intentions and motives in drawing the will as it was drawn, and in that connection the question arose as to when the letter could have been shown to Mr. Fayerweather or at any rate when it had been actually written; and Mr. Vaughan being on the stand, was asked this question:

"By Mr. Root:

"Q. Mr. Ritch states in this letter of the 13th

that he has had two long talks with you. Is that true?"

To which Mr. Vaughan answered:

"A. I think that date is a mistake.

"Q. What do you think was the date? A. I think the letter must have been written on the 14th.

"Mr. Coudert: Where is the envelope of this?

"Mr. Arnoux: Mr. Ritch says that is correct, it was the 14th.

F. 575 "Mr. Parsons: It was the Friday."

Is not that the way and the only way in which Mr. Coudert called for the envelope upon the trial of the contest in the Surrogates' Court?

A. I have no present recollection. I have testified to the extent of my recollection about what took place with reference to that date. It is impossible for me after an interval of nine or ten years to recall details of this character; the substance in some cases I can remember, the exact words I cannot.

180 Q. When you testified before Mr. Dayton that you attended with that memorandum yourself, did that testimony apply to the occasion when Mr. Coudert said "Where is the envelope of this?" and you an-

F. 576 swered "It was the Friday"?

Mr. Bovee: We object to the question as incompetent, the record of the Dayton trial and the record of Amherst against Ritch is the best evidence of what was testified to, and as incompetent and as leading, and as irrelevant and immaterial to the issue presented by the special plea.

A. I do not know whether that occurred or not and therefore I cannot tell whether my testimony referred to any such occurence or not. I have stated all that I remember about the question of date.

181 Q. And you have stated, have you not, on your present examination, as a matter which you remembered,

that Mr. Coudert made some reference to this envelope?

A. I do not remember to have said that; I stated that on the part of somebody some question arose about date.

182 Q. Have you not stated that that envelope was referred to by Mr. Coudert upon the Surrogates' contest?

A. I prefer to refer to the minutes for what I have said.

183 Q. Do you decline to answer this question otherwise than in that manner?

F. 577 A. I can add nothing to the answers which I have already given.

184 Q. Can you recall any fact which explains why, when Mr. Coudert said in the Surrogates' contest "Where is the envelope of this?" and you then attended with that memorandum yourself, you did not then produce it?

Mr. Bovee: I object to the question as incompetent and to the matter as irrelevant and immaterial to the issue presented by the special plea.

A. I cannot remember that what is assumed in the question occurred, and of course I cannot make an answer upon a hypothesis of that kind. What I remember is that some question arose about the date of something and that either a reference was made to the post mark

F. 578 on the envelope of a letter or that in some way counsel agreed upon the date, but just how that result was reached I fail to remember. I can remember matters which occurred upon that trial which in my judgment or according to my recollection bore upon the probate contest; there were many other matters introduced upon that trial which I did not think related to the probate contest, and they made a less impression on my mind.

185 Q. And in that last statement do you include Exhibit OA?

A. I include the conversation to which Mr. Vaughan testified. Exhibit OA was of no value by itself; my

recollection of it is that it was a blurred envelope as to which Mr. Vaughan testified that upon it he made some pencil memorandum when with Mr. Fayerweather on November 15th, 1890. The substantial things, the material things was what then occurred. To that Mr. Vaughan had then testified or did then testify.

186 Q. Do you mean by your last answer to convey the idea that you do not remember whether the blurred envelope did not contain thereon those words which had been previously read to you that day?

F. 579 A. I mean to say that nothing was clearly written on the envelope. I have said that the envelope was blurred, as would be the case with a pencil writing which a man had carried in his pocket; but it did say and I know that it contained the words which appear on the Truax trial, because I there again had with me that envelope and the letter which it contained; the envelope I remember particularly, and my recollection is that I sought to get that envelope in evidence then, and that either the envelope or the conversation between Mr. Vaughan and Mr. Fayerweather to which it referred was objected to by the counsel for Mr. Reynolds, and that after persistent objections on their part I tried to get that conversation in evidence by using the memoran-

F. 580 dum on the envelope, and that against objection by counsel for Mr. Reynolds and others I got so far as to procure permission from the Court to have Mr. Vaughan state that from what was said by Mr. Fayerweather to himself on that morning he did take down the pencil memorandum; and in my effort to get the conversation before the Court against the objection of counsel for Mr. Reynolds and others I finally offered the memorandum. This also was objected to, but in the end my recollection is that both the conversation and the memorandum came into evidence. I saw the memorandum at that time.

Mr. Sherman: I move to strike out the answer com-

mencing with the words "Because I then" as not responsive.

187 Q. You were in the Truax trial resisting the effort of the plaintiffs there to establish the contention that Mr. Fayerweather in his life time had made an agreement with his executors that in substance if he should leave them the residuary estate they would dispose of it by applying it to the institutions enumerated in the ninth clause of his will and thereby avoid any question of the operation of the statute of wills of 1860 upon the
F. 581 will as a testamentary paper, were you not?

(At the request of the witness, Question No. 187 was repeated by stenographer.)

A. That is a partial and incomplete statement of what I was there for, possibly that being within the general function which I thought belonged to me then.

188 Q. And in pursuance of that resistence to that contention you introduced among other things this conversation and this envelope, did you not?

Mr. Bovee: We object to that as incompetent, that the record already in evidence in this case of Amherst *vs.* Ritch is the best evidence of what was done upon
F. 582 that trial.

(At the request of the witness, Question No. 188 was repeated by stenographer.)

A. I introduced that conversation in order that the Court might be informed about any expression of Mr. Fayerweather with reference to any wishes he might entertain, I did not introduce the envelope for any such purpose, I used the envelope to try and get in evidence the conversation over the resistance and objections of Mr. Reynolds' counsel and the counsel for the colleges. As the Court sustained the objection to the conversation,

and I thought the Court ought to be informed about it, I tried to get the conversation in by first getting the envelope in and then showing that the envelope was a memorandum of a conversation. The envelope had no importance of itself, the conversation was the important thing. And when I say Mr. Reynolds' counsel I do not mean Mr. Sherman. The first counsel known to me to represent Mr. Reynolds was Mr. Coudert. The counsel upon the Truax trial was Colonel James. Mr. Sherman was not so far as I know related to the litigation at that
F. 583 time.

Mr. Sherman: It is now one o'clock. Would it be convenient for you to come back at two o'clock? If not, when can you come back?

Mr. Parsons: I can attend here until half past one.

Mr. Sherman: You do not want to come back this afternoon?

Mr. Parsons: I cannot.

Mr. Sherman: I do not desire to conflict with your other engagements, but our time to take our testimony expires on the first of February and it may be necessary to ask for a short extension, and that I desire to avoid.

Mr. Parsons: In so far as any accommodation shall be extended to us, we will take care to see that
F. 584 it is not to the disadvantage of the complainants. I state that as counsel.

Mr. Sherman: Well, when we adjourn at this time, in view of that, I will consent to your going on with the rest of your deposition at such time as may be convenient to you, it being understood that we be not pressed by the present limitation of time.

Mr. Parsons: Now will you use up another half hour?

Mr. Sherman: Yes.

189 Q. At the time you so introduced the Exhibit OA in the trial before Judge Truax, evidence had been given having a tendency to show that the absolute devise to the executors of the residuary estate was subject, if not to

to any controlling trust or restraint, to some expression of wishes upon Mr. Fayerweather's part as to the disposition of it or of some of it by the executors, is it not so?

Mr. Bovee: Counsel for the defendants objects upon the ground that the record in Amherst *vs.* Ritch is the best evidence of what occurred and what was testified to there, and he objects to the matters as irrelevant and immaterial to the the issue presented by the special pleas, and as incompetent and leading.

A. I will not say that there was at that time any
F. 585 evidence in the case which in my judgment tended to show that there was any limitation upon the devise of the residuary estate to the executors, There were in evidence the memoranda to which reference has been made upon which that claim was predicated, and it was contended that promises were to be inferred or were made by Mr. Ritch, Mr. Vaughan or Mr. Bulkley, either, any or all. When I say it was contended I mean that it was contended by the counsel for Mr. Reynolds, and in an indirect way, or perhaps a direct way, the same contention was made by the counsel for the colleges.

It was my opinion then and I have never changed it, that no promise by Mr. Ritch was proved, that no promise by
F. 586 Mr. Vaughan was proved, that no promise by Mr. Bulkley was proved, and that there was no evidence to justify that claim. Mr. Bulkley had never spoken to Mr. Fayerweather upon the subject. Between Mr. Fayerweather and Mr. Ritch there had taken place what was in evidence as shown by the testimony of Mr. Ritch, that is to say, I assume that from Mr. Ritch's testimony. And between him and Mr. Vaughan had occurred that to which Mr. Vaughan has testified so far as his testimony disclosed. The Court held that putting it altogether it showed a trust. I bow with due submission to the judgment of the Court, but that is without any reference to whether I think the judgment is right or wrong.

Mr. Sherman: I move to strike out so much of the answer as begins with the words "I bow with due submission" as not responsive.

190 Q. Was it any part of your effort in the conduct of your side of that cause to establish that whatever wishes Mr. Fayerweather had expressed he finally left the performance thereof entirely in the discretion of the residuary legatees?

(At the request of the witness, Question No. 190 F. 587 repeated by the stenographer.)

A. That was not my position and no part of my position.

191 Q. What bearing did you suppose the testimony of Mr. Vaughan concerning "more institutions for benefit" would have or should have upon the establishment or destruction of a secret trust for which the plaintiffs were in that action contending?

Mr. Bovee: We object to that as incompetent, and as irrelevant and immaterial to the issue presented by the special plea, the record in Amherst *vs.* Ritch is the best evidence of what was contended there.

F. 588 A. The bearing of the conversation between Mr. Fayerweather and Mr. Vaughan, at which time was made the memorandum as Mr. Vaughan testified, bore upon the claim made by the plaintiffs in that suit, and if my recollection serves me correctly made by Mr. Reynolds, through his counsel, that there was a trust in favor of colleges, that Mr. Fayerweather's wish was that his residuary estate should go to colleges. It seemed to me that Mr. Vaughan's testimony of that conversation showed that that was not so. It bore neither one way nor the other upon the question of trust or no trust; in fact, I remember distinctly that during the progress of the trial the then counsel for Mr. Reynolds took exactly the oppo-

site position from that which is now taken by his counsel, that is to say, Colonel James contended that it was entirely immaterial and it was unnecessary to consider whether Mr. Fayerweather had any wish that his property should go to other institutions as against going to colleges so far as concerned the position of Mrs. Fayerweather and the women you have called Mrs. Emma Fayerweather and Mrs. Achter. I think Colonel James' brief will show it, that he argued that to any claim that was made by him for the so-called widow and next of
F. 589 kin this was entirely immaterial and unimportant.

Mr. Sherman: I move to strike out that part of the answer which begins "in fact I remember distinctly" as not responsive.

192 Q. Standing alone at the time you offered that Exhibit OA in evidence and irrespective of that conversation to which OA related, did not the testimony tend to show that Mr. Fayerweather had made his will in October, 1884, had put into the tenth clause a provision substantially that the residuary estate, if any there should be, should go to the institutions which were legatees in the ninth clause, that the first codicil to the will dated in December, 1884, annulling the tenth clause and giving the residuary estate to Mr. Bulkley and Mr. Ritch, in connection with
F. 590 the memoranda which were introduced in evidence, showed that the intention then was to bestow the residuary estate upon the institutions in the ninth clause by some other method than by the operation of the tenth clause, that being the first form in which the same intention was expressed, and did not Exhibit OA and the conversation with which it was bound up, in your view when you offered it in evidence, have a tendency to counteract that earlier contention and to leave such control as there might be upon the disposition of the residuary estate in the discretion of the executors and also in that connection tend to establish that on his last day Mr. Fayerweather had not himself then made up his mind what institutions

should profit by the residuary estate but had left the matter in such a shape as might be properly and was properly carried out by the deed of gift?

Mr. Bovee: We object to the question as leading and incompetent, and to the matter sought to be elicited as irrelevant and immaterial to the issues presented by the special plea, that the record of Amherst *vs.* Ritch is the best evidence of what transpired there.

The Witness: Read it and let me see if I can understand it.

F. 591

(Question No. 192 repeated by stenographer.)

A. If I am to make my answer apply to the whole of that complicated question yes or no, I would say no. A great many propositions are involved there, and they do not correspond with my judgment or recollection of the situation taken as a whole.

193 Q. To what extent do they accord with your recollection of the situation?

A. My judgment was and is that Mr. Fayerweather had not intended to break the law but to comply with the law, that he had intended that the devise to his executors should be absolute and individual and that there was no other trust than that, if it may be called a trust,

F. 592 I do not call it a trust, which depended from beginning to end upon the absolute power and volition of the executors. I think, therefore, that the evidence tended to show that all the action on the part of Mr. Fayerweather was consistent with a purpose that his executors should take absolutely, and nothing seemed to me to be more absurd than to hold that the devise to Mr. Bulkley was in pursuance of a promise or upon a trust when the testimony disclosed that Mr. Fayerweather never spoke to Mr. Bulkley on the subject and that nobody else ever spoke to Mr. Bulkley upon the subject until after Mr. Fayerweather's death. And I want it to be

understood in this connection that the real contest before Judge Truax was between the colleges on the one side, the donees under the deed of gift on the other, each represented by their own counsel, and on the third side, if that is the proper expression, Colonel James as representing Mr. Reynolds and these two women, and that by that time the part of the executors, whether as executors or individually, had become subordinate, they were assuming to have no interest, had executed a deed by which whatever interest they had or they might be ad-
F. 593 judged to have they parted with, so that they were in a way spectators of a contest between other parties in interest. However, I was there to see that their interests were looked after and do what I could, and I have been trying to do it ever since.

194 Q. Was the deed of gift to which you have just referred executed in pursuance to an obligation or spontaneously, that is, as a matter of grace?

A. It was executed at the time it was executed, it was pending the probate contest, in order that it should not be claimed that the executors individually had any personal interest; and furthermore for the reason that to the deed of gift I desired at that time to have the concurrence and approval of Mrs. Fayerweather, and
F. 594 for that reason as soon as it was executed or drafted, I sent it to Mr. Coudert and asked him—and gave him the opportunity of making suggestions about beneficiaries on behalf of Mrs. Fayerweather, or of Mrs. Fayerweather doing so—there is a letter somewhere which I wrote to Mr. Coudert on the subject—and I have always understood that it met with the approval of Mrs. Fayerweather; at all events I never heard anything to the contrary.

Mr. Sherman: I move to strike out so much of the answer as begins "I have always understood" as not responsive and as incompetent.

195 Q. Did Mr. Coudert make any suggestions as to beneficiaries under the deed of gift?

A. Somebody, and I infer that it was Mr. Coudert, made a suggestion that Miss Joyce, who, according to the will and codicils, was forbidden to marry, and wanted to marry Mr. Reynolds, and that it was desired that the deed of gift should relieve against that in addition and increase the provision for this lady from, I think, $1,000 to $4,000,—somebody and I think that it must have been

Mr. Coudert, because I have no recollection of
F. 595 having had conversations with anybody else upon

the subject, made a suggestion that under some reserved clause in the deed of gift, this is the way the matter is in my memory, larger provision should be made for Mrs. Fayerweather than any sum which had been first mentioned. This subject was referred to yesterday and I was asked whether I made some proposition, I do not remember that I made any proposition upon the subject, but I know that there was talked at the beginning a lesser sum than the sum which, according to my recollection, Mr. Coudert eventually proposed.

196 Q. My last question was intended to call for the information whether Mr. Coudert had suggested any of the

institutions which were made beneficiaries by the
F. 596 deed of gift.

A. Not to my recollection. That is not the way it came about. The deed of gift was submitted to Mr. Coudert for his suggestion of changes or additions if Mrs. Fayerweather desired to have them made.

197 Q. Did you personally suggest any of the beneficiaries under the deed of gift?

Mr. Bovee: I object to it as irrelevant and immaterial and not in any way connected with the issue presented by the special plea.

A. I have before me now what purports to be a copy of the deed of gift, and before answering the question I wish to add to my preceding answer that the proposition

with reference to Miss Joyce as embodied in the deed of gift was that the annuity of $4,000 provided by the will should be for the period of her life instead of for the period up to her marriage. I had some conversation, general in its character, about the gift for the Cooper Union, although I think that it simply consisted in the statement by someone that Mr. Fayerweather had known Mr. Cooper, one being in the leather and the other in the glue business, and that he had a great regard for him, and I think that out of that came some conference between Mr.
F. 597 Abram S. Hewitt and Mr. Bulkley, probably. I do not recall that I did anything more in reference to that gift than I have stated. I do not remember that I suggested as one of the beneficiaries the New York Cancer Hospital, but as I was the president of that hospital at the time and am still it is quite likely that I told these gentlemen that I should be glad, if they saw fit, to make a gift to that hospital; and I do remember that I had conversations with the executors about the gift to the Women's Hospital. I was the president of that hospital at the time and I remember referring to the fact that it was mentioned in one of Mr. Fayerweather's testamentary papers that it was purposing to put up a new hospital building and that it might be agreeable to the ex-
F. 598 ecutors and probably to Mrs. Fayerweather that a memorial building for that hospital should be erected, I do not remember that I made any other suggestion. And in connection with all these suggestions it must be distinctly understood that they were all subordinate to the general provisions of the deed of gift which were that Messrs. Bulkley, Ritch and Vaughan as residuary devisees and legatees would not retain for their own use any part of the residuary estate, and that the instrument was executed recognizing that there was pending the probate contest and that the executors assumed no responsibility for the result of that contest, that their object was, each for himself, only to give away

whatever might come to him as residuary devisee and legatee.

198 Q. Was that clause put in there because on the 24th of February, 1891, the parties executing it were in doubt as to whether they had anything to give away under the residuary clause?

Mr. Bovee: We object to it as incompetent and irrelevant and immaterial to the issue here.

(At the request of the witness, Question No. 198 F. 599 was repeated by stenographer.)

A. It was not put in because of any doubt on my part, but Mr. Coudert, on behalf of Mrs. Fayerweather, and Judge Rollins on behalf of these other two persons, had claimed that, granting that the will was proved, none the less here was an attempt to evade the law and that that invalidated the provision, or to a certain extent invalidated the provisions which were in favor of the executors; and I recognized the professional position of Mr. Coudert and of Judge Rollins and their knowledge of the law, and I did not propose to assume that whatever opinion I entertained was free from doubt when they insisted upon the reverse situation. The clause was by way of extreme caution.

F. 600 199 Q. Do you mean then to be understood that the clause which you have quoted from the deed of gift was put in by the executors notwithstanding that you had no doubt that they had an unqualified title under the residuary clause out of deference to the advice of counsel for Mrs. Fayerweather and the next of kin, namely Mr. Coudert and Mr. Rollins, without reference to the opinion, of the three gentlemen who were thus giving away three million dollars, or as to their desire to give it away or their right to retain it?

A. These gentlemen were not giving away anything unless it ultimately became established that they had something to give. I do not mean at all what the ques-

tion suggests. All I mean is that here was a controverted question as to which Mrs. Fayerweather and the other two persons through their counsel claimed the provision was invalid and the executors were entitled to nothing, and I had to recognize that fact.

200 Q. Did you recognize it by including it in the clause which you have read from the deed of gift?

A. I do not so construe it. If it were ultimately held that the devise was either in whole or in part invalid, to that extent the deed of gift did not oper-

F. 601 ate.

201 Q. Did you draw the deed of gift?

Mr. Bovee: We object to it as irrelevant and immaterial.

A. I had nothing to do with it. I think Mr. Haley Fiske and I principally were concerned in the drafting of the deed of gift. I am not speaking now about the insertion of names, I am speaking now about the frame work —and that reminds me that I have a sort of impression that the original suggestion—I cannot at this moment discriminate between what was done by me and what was done by others. I approved the deed when it was complete, that I remember.

202 Q. How many of the institutions named as

F. 602 donees in the deed of gift were then clients of yours?

A. Then clients of mine?

203 Q. Yes.

A. I do not recognize any one as a client of mine. I think that at some time or another I may have done some trifling law business for the Cooper Union but I cannot recall it.

Mr. Sherman: It is now a quarter of two, Mr. Parsons. When will it be convenient for you to go on again?

Mr. Parsons: I shall have to send you word.

Mr. Sherman: Will you be able to go this week?

Mr. Parsons: No, not this week.

Mr. Sherman: Or next week?

Mr. Parsons: It depends altogether upon the Plant case, which is hung up by the absence in the Supreme Court of some of the counsel.

Mr. Sherman: Is it probable that some day next week you will be able to proceed?

Mr. Parsons: If the Plant case goes over further
F. 603 then I will devote myself to this matter. If the Plant case goes on, that will absorb me until I have finished.

Mr. Sherman: There is no certainty of your going on this week, then, or next?

Mr. Parsons: There is no other certainty than comes from the fact that the trial has been interrupted and may be interrupted again.

Mr. Sherman: My suggestion is that we go on with your deposition at as early a time in the next two weeks as you can attend to it and that in the meantime the complainants' time to take their testimony be extended for two weeks by consent.

Mr. Parsons: As counsel I acquiesce in the ex-
F. 604 tension for two weeks of the time to take testimony.

Mr. Sherman: That will run from the first of February, as I now understand the order.

Mr. Parsons: I am willing so far as my testimony goes or as the cross examination of Mr. Reynolds goes, to make an appointment for Monday morning at half past ten o'clock, conditioned that something shall interrupt the trial of my Plant case or that I shall not be in the Circuit Court of Appeals.

Mr. Sherman: I will attend here on Monday morning at half past ten o'clock with the hope that we may go on with you. If not, I shall be obliged to do something else, if you are not here.

At this point a recess was taken until 2:45 P. M.

F. 605

F. 606

AFTER RECESS.

NEW YORK, January 24th, 1901.

EMMA S. FAYERWEATHER, called as a witness on behalf of the complainants, being duly sworn, testified as follows:

F. 607

Direct examination by Mr. Sherman:

1 Q. You are one of the complainants in this suit, are you not, Miss Fayerweather?

A. Yes, sir.

2 Q. And was your name formerly Emma S. Drury?

A. It was.

3 Q. You obtained a divorce, I believe?

A. Yes, sir.

4 Q. And under the decree of divorce you resumed your maiden name?

A. Yes, sir.

5 Q. Are you one of the nieces of the late Daniel
F. 608 B. Fayerweather?

Mr. Bovee: We object to this as incompetent, irrelevant and immaterial, and not proper proof of the relationship of the complainant.

A. Yes.

6 Q. Did you know Daniel B. Fayerweather in his life time?

A. Yes, sir.

7 Q. Were you a visitor at his house?

A. Yes, sir.

8 Q. In New York?

A. Yes, sir.

9 Q. That was at 11 East 57th Street?

A. Yes, sir.

10 Q. At what time were you a visitor there?

Mr. Bovee: We object to it as irrelevant and immaterial as to any issue presented by the special pleas.

A. I was there a number of times.

11 Q. What was the latest occasion in his life time?

A. I do not think I can recall the date.

12 Q. Well, as nearly as you remember.

A. I think it was in 1890, but I am not sure.

13 Q, Was it in the same year in which he
F. 609 died?

Mr. Bovee: We object to that as incompetent, the witness was not present, if she knows when he died.

A. No, sir, it was not the year he died.

14 Q. Was it the year before?

A. No, sir; I guess it was not.

15 Q. What is your best recollection as to how long before you received notice of his death that it was that you were last a visitor at his house?

A. Well, I should say within three years.

16 Q. And on that occasion for how long a time were you a visitor there?

A. A week or two.

17 Q. What is the longest period at which in his
F. 610 life time you were a visitor at his house?

A. Three months.

18 Q. Do you remember when that was?

A. I can tell very nearly.

19 Q. Tell as nearly as you can.

A. It was either 1880 or 1881.

20 Q. At that time were you going to school?

A. Yes, sir.

21 Q. What was the occasion of your visit to his house then?

Mr. Bovee: I object to it as incompetent, irrelevant and immaterial as to the issues presented by the special plea.

A. Why, it was for the purpose of going to school.

22 Q. Did you go to school from his house on that occasion?

A. Yes, sir.

23 Q. Where did you attend school?

A. I do not remember; I think it was on 56th Street.

24 Q. Did you ever hear him speak of your relationship to him?

Mr. Bovee: One moment; we object to that as
F. 611 incompetent.

A. Why he has always spoken of us as his nieces.

25 Q. You and whom else?

A. My sister Mrs. Achter, also Mrs. Judge Beardsley.

Mr. Bovee: Same objection.

26 Q. Morris B. Beardsley's wife?

A. Yes, sir.

27 Q. You three were sisters, were you?

A. We were.

28 Q. And your father was whom?

A. A brother.

F. 612 Q. What was his name?

A. William.

30 Q. A brother of Daniel B. Fayerweather?

Mr. Bovee: We object to it as incompetent, the witness is incompetent to testify to the relationship.

A. Yes, sir.

31 Q. Did you ever hear Daniel B. Fayerweather speak of your father as his brother?

Mr. Bovee: We object to the testimony as a violation of Section 829 of the Code of Civil Proceedure.

A. Yes, sir.

32 Q. What did he say on those occasions, do you remember?

Mr. Bovee: We object to the testimony as irrelevant and immaterial to the issue presented by the special plea; we object to the testimony as incompetent and in violation of Section 829 of the Code of Civil Proceedure as involving a transaction between the witness and the deceased.

A. Nothing more than speaking of him as his brother, that I can recall.

33 Q. Your father is now dead?

A. Yes, sir.

F. 618 34. And did you hear him in his life time speak of Daniel B. Fayerweather?

A. Yes, sir.

35 Q. Did he speak of his relationship to him?

A. Yes, sir.

36 Q. What did he say it was?

Mr. Bovee: We object to it as irrelevant and immaterial to the issue presented by the special plea, and we object to it as incompetent; the conversations between this witness and her deceased father are not evidence of the relationship of the parties.

A. He spoke of him as his brother.

37 Q. What other members of the family of Daniel B. Fayerweather or relatives of Daniel B. Fayer-

F. 614 weather have you known or met?

A. My grandmother, Uncle Daniel's mother.

33 Q. What was her name?

A. Amelia Lacey.

39 Q. Have you ever seen any monument or tombstone erected by Daniel B. Fayerweather to the memory of his father and mother?

Mr. Bovee: Objected to as irrelevant and immaterial to the issues presented by the special plea.

A. I saw it from the road in front of the cemetery.

40 Q. Where is that cemetery?

A. Stepney, I think.

41 Q. In what state?

A. Connecticut.

42 Q. (Handing photograph) Look at the photograph which I now show you and state whether that is a picture of the monument which you then and there saw.

Mr. Bovee: We object to it as incompetent, it not having been proven that the picture shown to the witness is a correct representation.

A. I should say it was.

Mr. Sherman: I offer it in evidence.

Mr. Bovee: We object to it as irrelevant and
F. 615 immaterial to the issues presented by the special plea. We object to it also on the ground that the photograph has not been properly identified or shown to have been properly made to make it admissible as a representation of the monument.

The photograph was marked Complainants' Exhibit, No. 9, January 24, 1901, C. B. (See Exhibit 84 in Appendix of Exhibits.)

43 Q. When did your father die?

Mr. Bovee: We object to it as irrelevant and immaterial to the issues presented by the special plea.

A, The 11th day of June of 1878.

44 Q. Did you ever see your father and Daniel
F. 616 B. Fayerweather together?

Mr. Bovee: I object to it as irrelevant and immaterial to the issues presented by the special plea.

A. Yes, sir.

45 Q. Where latest?

Mr. Bovee: Same objection.

A. In my father's last sickness.

46 Q. And where was that?

A. In the bedroom.

47 Q. In what place?

A. Muscatine, Iowa, or rather on the farm near Muscatine, Iowa.

48 Q. Did Daniel B. Fayerweather address your father by any terms of kinship then?

Mr. Bovee: We object to it as incompetent, irrelevant and immaterial and not proper evidence.

A. Yes, sir.

49 Q. What did he call him then?

Mr. Bovee: Same objection.

A. Brother.

50 Q. So far as you know or have ever heard, were there any relatives, blood kin of Daniel B. Fayer-
F. 617 weather during your life time other than Mr. Fayerweather's mother, Amelia Beardsley, your two sisters, Mrs. Achter and Mrs. Morris B. Beardsley, your father William and yourself?

Mr. Bovee: We object to the question as incompetent, irrelevant and immaterial to any issue presented by the special plea.

A. There was another brother.

51 Q. And is that all?

A. All that I know of.

52 Q. All that you ever heard of in your life time in the family?

A. All that I ever recollect of.

53 Q. And who was that other brother?

F. 618 A. Aaron Fayerweather.

54 Q. And is he dead?

Mr. Bovee: Objected to as incompetent, irrelevant and immaterial.

A. Yes, sir.

55 Q. Where did he die?

A. I do not know where he died.

56 Q. When did you hear of his death?

Mr. Bovee: I object to it as incompetent, irrelevant and immaterial and as hearsay evidence.

A. He must have died when I was very, very small.

57 Q. Whom did you hear speak of his dying?

Mr. Bovee: We object to the testimony as incompe-

tent, and hearsay, and as incompetent, irrelevant and immaterial to the issues presented by the special plea.

A. My father.

58 Q. And about when did you hear him speak of that?

Mr. Bovee: Same objection.

A. Well, it must have been when I was seven years old.

59 Q. What did he say about the death of his brother Aaron?

F. 619 Mr. Bovee: We object to it as irrelevant and immaterial to any issue presented by the special plea, and as incompetent, any declarations made by her father.

A. Now, what I recall is I think he came East after the death of Aaron Fayerweather.

60 Q. You say he came East, who?

A. My father came East after the death of Uncle Aaron.

61 Q. Well, did he say that?

A. I remember the preparations but I could not recall what the conversations were.

62 Q. Do you remember in talking about coming East he talked about the death of Aaron Fayerweather

F. 620 in substance?

Mr. Bovee: Same objection.

A. Well, I could not recall that.

63 Q. I do not ask you for the precise words, but what was the purport of it, what did he say about it in substance.

A. That his brother was dead and that —

64 Q. And that what, anything else?

A. And that he was simply going East to see what was necessary.

65 Q. On the 29th of June, 1897, when the bill of complaint was filed in this case, of what state were you a citizen?

A. Muscatine, Iowa.

66 Q. Did you reside there then?

A. Yes, sir.

67 Q. And how long previously to that had you resided there?

A. All my life.

68 Q. Were you born there?

A. I was born on a farm just a few miles out of the city.

69 Q. In the State of Iowa?

F. 621 A. Yes, sir.

70 Q. And was that at your father's home?

A. Yes, sir.

71 Q. Where did your husband Mr. Drury live when you were married?

A. Muscatine, Iowa.

72 Q. Were you in this state at the time the contest over the probate of the will and codicils of Daniel B. Fayerweather was going on in the Surrogates' Court, that matter having begun by petition for probate dated April 5th, 1890, and having resulted in a decree admitting the codicils to probate, the will having been previously admitted to probate on or about February 25th, 1891?

Mr. Bovee: We object to it as irrelevant and
F. 622 immaterial to any issue presented by the special plea.

A. Yes, sir.

73 Q. When did you come to New York during those dates?

Mr. Bovee: Counsel for defendants objects on the ground that the matter is irrelevant and immaterial to any issue presented by the special pleas.

A. When it was in the Surrogate's office.

74 Q. Well, there are a great many things in the Surrogates' office and dates occurred between the fifth of December, 1890, and the twenty-fifth of February, 1891.

Can you be more precise as to when you first came to New York during that period?

A. Do you wish me to give a date?

75 Q. If you can, yes.

A. I could not give the date.

76 Q. Give the month, if you can.

A. I was here between Christmas and New Years but I cannot tell just when I came.

77 Q. Were you in the Surrogate's Court at any time during that period?

F. 613 A. Yes, sir.

78 Q. Were you there while the trial was going on?

A. I think you would call it the trial, yes, sir.

79 Q. What did you hear or see that you describe as a trial?

Mr. Bovee: One moment. Counsel for defendants objects to the testimony as irrelevant and immaterial to the issues presented by the special plea.

A. They were examining the witnesses to the will.

80 Q. Well, whom did you hear examined?

Mr. Bovee: One moment. Counsel for defendants objects to the testimony as irrelevant and immaterial to the issue presented by the special plea.

F. 614 A. Miss Lizzie Joyce was one.

81 Q. Yes, any others.

A. I do not think that I could positively name any of the others.

82 Q. Well, was this proceeding which you describe as an examination a proceeding where the Surrogate sat on the bench and there were counsel talking?

Mr. Bovee: Counsel for the defendants objects to the testimony as irrelevant and immaterial to the issue presented by the special plea.

A. I should think it was.

83 Q. Well, what did you see or hear going on there while you were in the Surrogate's Court?

Mr. Bovee: Counsel for the defendants objects to the testimony as irrelevant and immaterial to the issue presented by the special plea; and what transpired in the Surrogate's Court is the best evidence of the record of that trial.

A. Just the examining of the witnesses.

84 Q. Well, was the Surrogate there?

A. I should think so, as near as I understand your law.

85 Q. What kind of a room was it?

F. 625 Mr. Bovee: Counsel for the defendants objects to the testimony as irrelevant and immaterial to the issue presented by the special plea.

A. A court room.

86 Q. Well, you call it a court room; are you sure it was a court room?

A. To the best of my knowledge it would be.

87 Q. Well, did it have an elevated bench with the judge sitting behind it?

Mr. Bovee: Counsel for the defendants objects to the testimony as irrelevant and immaterial to the issue presented by the special plea, and further objects to the counsel cross examining his own witness.

A. It did.

F. 626 88 Q. Did you go alone or with somebody?

Mr. Bovee: Counsel for the defendants objects to the testimony as irrelevant and immaterial to the issue presented by the special plea.

A. I went with others.

89 Q. Well, with whom did you go?

A. My sister Mrs. Beardsley and Mrs. John B. Reynolds.

90 Q. And others?

A. I think there was a Miss Emily Burrows from Brooklyn with us.

91 Q. Were there any counsel at that time or attorneys

employed or authorized by you to represent you in that matter?

Mr. Bovee: One moment. Counsel for the defendants objects to the testimony as irrelevant and immaterial to the issue presented by the special plea.

A. Yes, sir.

92 Q. Who?

A. Mr. Rollins.

93 Q. Was Mr. Rollins employed on that occasion?

A. He was.

F. 627 94 Q. Did you see Mr. Parsons there?

Mr. Bovee: Counsel for the defendants objects to the testimony as irrelevant and immaterial to the issues presented by the special plea.

A. Yes, sir.

95 Q. How long were you there?

A. A day and I think a half.

96 Q. A day and a half.

A. A trifle over one day any way.

97 Q. Were those two occasions the only two occasions that you were in the Surrogate's Court?

Mr. Bovee: Counsel for the defendants objects to the testimony as irrelevant and immaterial to the issue presented by the special plea and asks that this objec-

F. 628 tion be put in before the answer of the witness is given.

A. Yes.

98 Q. Are you positive that those two occasions occurred between Christmas Day and New Year's Day?

Mr. Bovee: Counsel for the defendants objects to the testimony as irrelevant and immaterial to the issue presented by the special plea, and also upon the ground that it is irregular and improper as cross examination of the witness.

A. No, I am not positive as to when they were.

99 Q. Well, were those two occasions the only occasions when you were in the Surrogate's Court at any time,

whether between Christmas and New Year's Day of the years 1890 and 1891 or any other time?

Mr. Bovee: Counsel for the defendants objects to the testimony as irrelevant and immaterial to the issue presented by the special plea.

A. Yes, sir.

100 Q. Do you recall hearing any one but Miss Lizzie Joyce examined on those two occasions?

Mr. Bovee: Counsel for the defendants objects to the testimony as irrelevant and immaterial to the issue
F. 629 presented by the special pleas.

A. There were others but I cannot recall the names. Probably if you would read the names over I would recall them.

101 Q. It appears from the Surrogate's record that the examination of Miss Elizabeth R. Joyce as a witness before the Assistant to the Surrogate was on the eighth day of December, 1890, and that she was recalled for cross examination after recess on the fifth day of February, 1891, and that she resumed the stand on the twelfth of February, 1891. Were you present on two occasions when she testified, two different days?

Mr. Bovee: Counsel for the defendants objects to the question as assuming something which has not
F. 630 been proven, and objects to the matter sought to be elicited upon the ground that it is irrelevant and immaterial to the issue presented by the special plea, and incompetent as being a cross examination of complainants' own witness.

A. No, sir.

102 Q. You heard her testify on only one day?

A. Only one day.

103 Q. Was that the first day you were there or the second?

A. I could not say positively which day it was—Oh, it must have been the first.

Mr. Bovee: The same objection.

104 Q. Was she examined by Mr. Coudert?

Mr. Bovee: Counsel for the defendants objects to the question as irrelevant and immaterial to the issue presented by the special plea, that the record in the Surrogate's Court is the best evidence of what transpired there and by whom the witness was examined.

A. She was.

105 Q. Was she also examined by Mr. Parsons?

Mr. Bovee: Counsel for the defendants objects to the question as irrelevant and immaterial to the issue

F. 631 presented by the special plea; and the record of what transpired in the Surrogate's Court is the best evidence.

A. Yes, sir.

106 Q. State whether you heard any of the following witnesses examined while you were there, Haley Fisk?

Mr. Bovee: Counsel for the defendants objects to the question as irrelevant and immaterial to the issue presented by the special plea.

A. Yes, sir.

107 Q. Did you hear Bradford W. Hitchcock examined?

A. I think I did.

108 Q. Did you hear Charles L. Foster examined?

A. Yes, sir, I think so.

F. 632 Mr. Bovee: The same objection to all these questions.

109 Q. Did you hear Stewart L. Woodford examined?

Mr. Bovee: Same objection.

A. Yes, sir.

110 Q. Did you hear D. W. Hitchcock examined?

Mr. Bovee: Same objection.

A. Is he the witness to the will.

111 Q. These witnesses that you did hear examined, were such of them as you did hear examined attesting witnesses to the will or codicils?

Mr. Bovee: We object to the question as incompetent and as calling for the opinion of the witness; the will and

codicils are the best evidence as to whether they were or not.

A. Yes, sir.

112 Q. Did you hear any witness testify except such as were called as attesting witnesses?

Mr. Bovee: Counsel for the defendants objects to the question as irrelevant and immaterial to the issues presented by the special plea, and as incompetent as calling for the opinion of the witness.

A. No, sir.

F. 633 113 Q. Can you remember what was the condition of the contest at the time you left New York on that occasion?

Mr. Bovee: Counsel for the defendants objects on the ground that the matter is irrelevant and immaterial to the issue presented by the special plea, and as calling for the conclusion of the witness and not for the fact.

(Question No. 113 repeated by stenographer at request of the witness.)

A. No, sir.

114 Q. Was it still going on?

A. Yes, sir.

F. 634 115 Q. No agreement of which you knew had been made at the time you left?

Mr. Bovee: Counsel for the defendants objects to the question as irrelevant and immaterial to the issue presented by the special plea.

A. No, sir.

116 Q. Where were you when any agreement of which you knew anything was made with regard to the contest?

Mr. Bovee: Counsel for the defendants objects to the question as irrelevant and immaterial to the issue presented by the special plea.

The Witness: Do you mean any settling of the contest?

(Question No. 116 repeated by stenographer.)

A. Muscatine.

117 Q. And how long had you been in Muscatine after your visit to New York when the first knowledge of any such thing came to you?

Mr. Bovee: Objected to as irrelevant and imma-
F. 635 terial to the issue presented by the special plea.

A. A few days.

118 Q. Did you go directly from New York to Muscatine on that occasion?

A. No, sir.

Mr. Bovee: Same objection.

119 Q. Well, do you now recall how long a time all together you were in New York while the will contest was going on in the Surrogate's Court?

A. No, I cannot recall the length of time.

120 Q. Well, were you here after the first of January, 1891?

A. Not in New York City. Do you mean just in New York?

F. 636 121 Q. Yes.

A. No, I was not in New York City, only a very few days.

122 Q. Well, what period of time were you in New York City while the contest was going on in the Surrogate's Court?

A. As near as I recollect not more than three days.

123 Q. And were two of those days the two days when you went into the Surrogate's Court with the others as you have stated?

A. Yes, sir.

124 Q. And in what part of New York State were you during the rest of your visit?

A. I was not in New York State.

125 Q. Well, you asked me about whether I meant New York City which led me to infer that you referred to the State.

A. Well, I was in the East for a few weeks but I was up at Bridgeport, Connecticut, during the contest, I was not in New York City but a few days.

126 Q. And were you visiting your sister Mrs. Beardsley then?

A. Yes, sir.

F. 637 Q. At Bridgeport?

A. Yes, sir.

128 Q. Had there been any discussion to which you were a party prior to your return to Muscatine on that occasion respecting a settlement of the contest?

Mr. Bovee: Counsel for the defendants objects to the matter sought to be elicited on the ground that it is irrelevant and immaterial to the issue presented by the special plea.

A. No, sir.

129 Q. When was that matter first brought to your attention?

Mr. Bovee: Counsel for the defendants objects to the matter sought to be elicited upon the ground that

F. 638 it is irrelevant and immaterial to the issue presented by the special plea.

A. A few days after my return.

130 Q. And by what means was the matter brought to your attention at that time?

Mr. Bovee: Counsel for the defendants objects to the matter on the ground that it is irrelevant and immaterial to the issue presented by the special plea.

A. A letter from my brother-in-law.

131 Q. Mr. Beardsley?

A. Mr. Beardsley.

132 Q. Was that letter addressed to you or to your brother-in-law Mr. Achter?

Mr. Bovee: Counsel for the defendants objects to the testimony as irrelevant and immaterial to the issue presented by the special plea, and also upon the ground that the letter is the best evidence of what it contains and to whom it was addressed.

A. I cannot now say whether it was addressed to him or me.

133 Q. Prior to your coming to New York from Muscatine on the occasion spoken of by you did you see any letter written by Morris B. Beardsley to Henry Achter?

F. 639 Mr. Bovee: Counsel for the defendants objects to testimony as irrelevant and immaterial to the issue presented by the special plea.

A. I do not now recall.

134 Q. (Handing paper) Look at the paper which I now hand you and state whether that refreshes your memory upon that subject.

Mr. Bovee: Same objection.

135 Q. (Handing paper) Look at the paper which I now hand you and state whether you saw this after your return to Muscatine on that occasion and before any settlement was made, before you made any agreement to settle?

Mr. Bovee: Counsel for the defendants objects to the question as incompetent; he objects to the mat-

F. 640 ter sought to be elicited on the ground that it is irrelevant and immaterial to the issue presented by the special plea.

(At the request of the witness, Question No. 135 was repeated by stenographer.)

A. I do not know whether I saw this paper or not; this was written when I was visiting at Judge Beardsley's.

136 Q. Did you get such information as you had about the contest and the facts and the evidence and the merits of it prior to the agreement for settlement from Morris B. Beardsley.

Mr. Bovee: Counsel for the defendants objects to the question as incompetent, as calling upon the witness to give her conclusion and not the facts; and counsel for the defendants also objects to the matter sought to be elicited upon the ground that it is irrelevant and immaterial to the issues presented by the special plea.

A. Yes, sir.

137 Q. Did you have any other source of information than that?

Mr. Bovee: Counsel for the defendants objects
F. 641 to the matter on the ground that it is irrelevant and immaterial to the issue presented by the special plea.

A. No, sir.

138 Q. Did you execute a power of attorney to Morris B. Beardsley which he sent to you to be executed at Muscatine and did you return it to him executed?

A. A power of attorney for what?

139 Q. Any power of attorney.

A. Yes, sir.

140 Q. Was that some time in March, 1891?

Mr. Bovee: I object to it; the power of attorney is the best evidence.

Mr. Sherman: Counsel for complainants again
F. 642 calls upon the attorney for the defendants to produce the power of attorney.

Mr. Bovee: Counsel for the defendants is perfectly willing to produce the power of attorney, an opportunity being afforded for its production here, provided it is in the power of the counsel to produce it, I assume that it is in the possession of the executors, and if so I will be glad to produce it.

Mr. Sherman: Counsel for complainants states that inasmuch as he has previously made this same demand and met with a flat refusal he declines to wait longer for the production of it.

(At the request of the witness, Question No. 140 was repeated by stenographer.)

A. I do not recall the date.

141 Q. Well, what is your best recollection as to whether that was some time in March, 1891?

A. Yes, sir.

142 Q. As to whether it was on or about the 16th day of March, 1891?

A. Yes, sir.

F. 643 142 Q. At the time you executed and sent that power of attorney to Mr. Beardsley did you know that on the 25th of February, 1891, the Surrogate had made a decision in favor of admitting to probate the will, and that the question of admitting the codicils to probate was still open?

Mr. Bovee: Counsel for the defendants objects to the question as irrelevant and immaterial to the issues presented by the special plea, and not within any issue at large in the case.

(Question No. 143 repeated by the stenographer.)

A. No, sir.

F. 644 144 Q. Did you at that time know what evidence was relied upon by your counsel Mr. Rollins to resist the probate of the codicils?

Mr. Bovee: Counsel for the defendants objects to the testimony as irrelevant and immaterial to the issue presented by the special plea.

The Witness: I do not think I understand it.

(Question No. 144 repeated by stenographer.)

A. No, sir.

145 Q. Were you at that time aware or did you have then any information that Mr. Fayerweather had executed

on the eleventh day of November, 1890, a codicil drawn by Prescott Hall Butler, a lawyer, and which he had executed under the suggestions of Mr. Henry B. Vaughan and whereby he had undertaken to do away with the previous codicils creating a residuary legacy to Messrs. Bulkley and Ritch and to reinstate the tenth clause of his will which in substance undertook to give to the certain institutions mentioned in the ninth clause of his will his residuary estate?

Mr. Bovee: Counsel for the defendants objects
F. 645 to the question as incompetent, leading and incorporating matter which has not been proven. Counsel for the defendants objects to the matter sought to be elicited upon the ground that the matter is irrelevant and immaterial to the issue presented by the special pleas.

(Question No. 145 repeated by stenographer.)

A. Yes, sir. I knew there had a codicil been made on that day, but the real meaning of it I never did understand.

146 Q. You did not understand then that it had that tendency that is embodied in the question?

F. 646 A. No, sir.

Mr. Bovee: One moment. Note my objection to that question, the same objection as before.

Mr. Sherman: Counsel for complainants again consents that the answers may be taken subject to all objections which have been previously stated at length after each question provided that will dispense with the constant interruption of the deposition by repeatedly stating such objections at large.

147 Q. Had you any information at the time you executed that release that the purpose of the codicil of November 11th was, among other things, to displace Mr. Thomas G. Ritch as executor of Mr. Fayerweather's will?

Mr. Bovee: Counsel for the defendants objects to the question as irrelevant and immaterial to the issue presented by the special plea.

A. No, sir.

140 Q. Had you at the time you executed that release any information that the codicil of November 11th had been illegally destroyed?

Mr. Bovee: Counsel for the defendants objects to the question as irrelevant and immaterial; counsel for the defendants objects to the question as being incom-

F. 647 petent and leading.

A. Yes, sir.

149 Q. From whom did you obtain information at or prior to the time that you executed the release on the 16th of March, 1891, that the codicil of November, 11th, 1890, had been illegally destroyed?

Mr. Bovee: Defendants' counsel objects to the matter as irrelevant and immaterial to the issue presented by the special plea.

(Question No. 149 repeated by stenograper.)

A. The only recollection I have is Mrs. Reynolds.

150 Q. And when did she give you that infor-

F. 648 mation?

Mr. Bovee: Counsel for the defendants objects to the matter as irrelevant and immaterial to the issue presented by the special plea.

A. I cannot recollect when.

151 Q. Was it prior to the sixteenth of March, 1891?

Mr. Bovee: Counsel for the defendants objects to the testimony as irrelevant and immaterial to the issue presented by the special plea, and the witness has already answered that she cannot tell when. The question is in the nature of a cross examination of the counsel's own witness.

(Question No. 151 repeated by stenographer.)

A. Yes, sir.

152 Q. Was it during your visit when you attended on the Surrogate's Court that she gave you that information?

Mr. Bovee: Counsel for the defendants objects to the matter sought to be elicited on the ground that it is immaterial and irrelevant to the issue presented by the special plea.

A. That is when I think it was.

F. 649 153 Q. At the time that you signed the release on the sixteenth of March, 1891, or prior thereto, did you have any information that there was reason to believe that the codicil purporting to have been executed by Mr. Fayerweather on the fifteenth of November, 1890, was not his act and deed?

Mr. Bovee: Counsel for the defendants objects to the matter sought to be elicited on the ground that it is irrelevant and immaterial to the issue presented by the special plea, and also to the question as incompetent and leading.

(Question No. 153 repeated by stenographer.)

A. No, sir.

F. 650 154 Q. On the sixteenth of March, 1891, or prior thereto did you have any information that one Henry B. Vaughan was in Mr. Fayerweather's company at his house on the morning of the day of his death and that Mr. Fayerweather expressed to Mr. Vaughan some desire that there should be another codicil executed and that there should be in that codicil several provisions which were taken down by Mr. Vaughan upon the back of an envelope which he had with him, and that Mr. Vaughan thereupon went to the office of Arnoux, Ritch & Woodford, and after remaining there an hour or so, came away therefrom in company with two of Mr. Ritch's clerks with a proposed codicil drawn up in the handwriting of Stewart L. Woodford whereby the previous

will and codicils of Mr. Fayerweather purported to be altered in this respect, that is to say, by re-affirming and re-declaring the first codicil to Mr. Fayerweather's will, whereby Mr. Bulkley and Mr. Ritch were made residuary legatees in form absolutely, and further altering that disposition of his residuary estate by including Mr. Henry B. Vaughan as an equal legatee with them in the residuary estate, or that Mr. Vaughan and these two clerks came to Mr. Fayerweather's house, got into his room, and in some manner, without explaining to Mr. Fay-
F. 651 erweather the difference between the said proposed codicil and the instructions with which Mr. Vaughan had left the house, procured Mr. Fayerweather's name to be attached to the codicil?

Mr. Bovee: Counsel for the complainants objects to the question as incompetent in that it assumes facts which never have been proven and which can not be proven in so far as it assumes that there was misrepresentation or fraud perpetrated upon Mr. Fayerweather in the execution of the paper. We object to the question also upon the ground that it is grossly leading, and that the matter sought to be elicited is irrelevant and immaterial to the issues presented by the special plea.

F. 652 (Question No. 154 repeated by stenographer.)

Mr. Sherman: Answer the question.

Mr. Bovee: I object to the witness answering this question.

Adjourned to January 25th, 1901, at 10:30 A. M.

FAYERWEATHER
vs.
RITCH,

REYNOLDS
vs.
F. 654 RITCH.

COMPLAINANTS' PROOF.

NEW YORK, January 25th, 1901.

Met pursuant to adjournment. Present: The Examiner, Mr. Sherman, Mr. Blaikie, Mr. Bovee, a representative of Butler, Notman, Joline & Mynderse, and a reprerentative of Scott & Upton.

F. 655

Adjourned to January 28th, 1901, at 10:30 A. M.

FAYERWEATHER
vs.
RITCH,

REYNOLDS
vs.
F. 655 RITCH.

COMPLAINANTS' PROOF.

NEW YORK, January 28th, 1901.

Met pursuant to adjournment. Present: The Examiner, Mr. Sherman, Mr. Blaikie, Mr. Parsons, Mr. Bovee, Mr. Fain, Mr. McLaughlin, a representative of Messrs. Russell & Holmes, a representative of Messrs. Root, Howard, Winthrop & Stimson, and a repre-
F. 656 sentative of Messrs. Nash & Jones.

Adjourned to January 29th, 1901, at 10:30 A. M.

NEW YORK, January 29th, 1901.

Met pursuant to adjournment. Present: The Examiner, Mr. Sherman, Mr. Blaikie, Mr. Mr. Bovee, Mr. McLaughlin, Mr. Fain, Mr. Carnochan, a representative of Messrs. Root, Howard, Winthrop & Stimson, a representative of Russell & Holmes, and a representative of Messrs. Nash & Jones.

Adjourned to January 30th, 1901, at 10:30 A. M.

FAYERWEATHER
vs.
RITCH,
REYNOLDS
vs.
F. 657 RITCH.

COMPLAINANTS' PROOFS.

NEW YORK, January 30th, 1901.

F. 658 Met pursuant to adjournment. Present: The Examiner, Mr. Sherman, Mr. Blaikie, Mr. Bovee, Mr. Hutchins, Mr. Pain, Mr. McLaughlin, a representative of Root, Howard, Wintrop & Stimson, and a representative of Russell & Holmes.

Mr. Sherman: Counsel for complainants attends here for the purpose of the further examination of John E. Parsons, Mr. Parsons having requested that the record be be adjourned for that purpose; the suggestion having been made yesterday that he should attend at two o'clock

for that purpose, and having been altered at his express request so that we could attend at half past ten for that purpose. I am in attendence for the purpose of examining Mr. John E. Parsons if he can be induced to come here.

Mr. Bovee: Counsel for the defendants states that at the conclusion of the hearing yesterday, Mr. Reynolds was still upon the stand and under examination. It was adjourned to this morning at half past ten upon the supposition that the examination of the witness Reynolds
F. 659 was to be concluded. The complainants are ready to have Mr. Parsons appear here provided counsel for the complainants will stipulate that upon his appearing in the examination room his examination will be immediately taken up. Counsel for the defendants are prepared to continue the examination of Reynolds at this time pursuant to the adjournment last night, or if the complainants will stipulate that they will examine Mr. Parsons immediately, he will come to the room. Now you can do as you please. If you are prepared to examine Mr. Parsons he will come here, Mr. Sherman.

Mr. Sherman: By way of comment upon the observations just made by counsel for the defendants on the record, I read from the last page of yesterday's
F. 660 session.

Mr. Sherman: I do not think that until the full minutes shall be written out I can safely stop. I think I have covered as much ground as I care to until I shall get the remainder of this disposition. Mr. Parsons, if you desire to attend for that purpose after recess, I will proceed with your examination.

Mr. Parsons: I thought I was to be examined this morning. But when I get to my office I will see what my engagements are, and if I find that I may come here this afternoon, I shall be glad to get through with it.

Mr. Sherman: Well, shall we adjourn until to-morrow morning, then?

Mr. Parsons: I think that it would be better, subject of course to Court engagements.

Mr. Bovee: The only further comments that counsel for defendants has is that counsel for complainants reads from the minutes which he desired the opportunity of seeing before concluding the examination of Mr. Reynolds. Will you examine Mr. Parsons if he comes here?

Mr. Sherman: Yes, I have so stated.

Continuation of the examination of *JOHN E.*
F. 661 *PARSONS.*

By Mr. Sherman:

204 Q. Did you convey to Mr. Coudert or to Mr. Rollins in any way the information that you or your clients stood ready to place at his disposal all evidence which could bear upon the determination of the question of will or no will or in other words upon the questions depending in the Surrogate's Court?

Mr. Bovee: Defendants object on the ground that the matter is irrelevant and immaterial to the issues presented by the special plea.

A. I do not remember ever to have had any con-
F. 662 versation upon the subject with Judge Rollins.

I was not employed in the probate contest at the beginning. When I became employed there was pending a question of what should be done upon some request which had been made by Mr. Coudert or any memoranda of Mr. Fayerweather's or correspondence, and on the first occasion that I saw Mr. Coudert, or at the beginning of my relation to the contest, I told Mr. Coudert that if there were any papers or memoranda of the kind referred to which he desired to see or to have and of which he would let me know, I thought he was entitled to receive them and that I would do what I could to see his wish complied with. I think that at that time there was pend-

ing a motion for a discovery, at all events some proceeding, the details of which are not clearly in my mind; I do not think that I was connected with the contest when that proceeding took place; and my general recollection would be that it was then that that occurred, my conversation with Mr. Coudert.

295 Q. In your conversation with Mr. Coudert did you characterize the documents which you were willing to produce by the language used in your last answer "of the kind referred to?" If not, state as precisely as you can what kind or class or denomination of writings or evidence you expressed yourself to Mr. Coudert as willing to submit to his inspection?

F. 663

Mr. Bovee: Defendants make the same objections as before.

A. My general recollection would be that what Mr. Coudert asked for was memoranda of Mr. Fayerweather and correspondence between him and Mr. Ritch particularly, possibly Mr. Vaughan.

206 Q. Was Mr. Coudert's description of the papers which he desired to inspect following upon any statement by you as to what papers were in existence and limited by you to writings of Mr. Fayerweather or correspondence between him and Mr. Ritch particularly and possibly Mr. Vaughan?

F. 664

Mr. Bovee: Defendants make the same objections before and to the question as incompetent.

(At the request of the witness, Question No. 206 was repeated by stenographer.)

A. No, not at all; Mr. Coudert's wish did not follow anything said by me. Anything said by me followed some expression on the part of Mr. Coudert of a wish for papers of the descriptions to which I have referred which were material to or could be used upon the probate contest, which was the only contest at that time pending, and so far as I know the only contest then contemplated.

207 Q. You put Mr. Coudert in the position of appealing to you as one having more information than he as to what documents of that kind existed. Is that the correct view?

A. I put Mr. Coudert in no position of any kind.

208 Q. Is it not clear that you want it to be understood that Mr. Coudert applied to you as one who had knowledge of what writings existed on the question of probate and that you responded as a person having more information upon the subject than he then had respecting

F. 665 those writings?

Mr. Bovee: Same objections.

A. I have stated only to the extent that my memory at the present time serves me exactly what occurred.

209 Q. Do you mean to say upon your oath that you do not now know or remember whether at the time you represent this conversation as occurring you did not then have more information than had Mr. Coudert as to what writings of the sort described by you existed?

Mr. Bovee: Defendants object to the question as incompetent and as impertinent and to the matter as irrelevant and immaterial to the issue presented by the special plea.

A. All that I say is under oath.

F. 666 Mr. Sherman: The question is repeated.

(Question 209 repeated by the stenographer.)

A. I do not know and I do not see how it is possible I should know what was Mr. Coudert's knowledge upon the subject. I have stated what occurred.

210 Q. Do you consider that an ingenuous answer to the last question?

A. I decline to make any response to questions of that character.

211 Q. Do you wish to be understood as testifying that you do not know whether Mr. Coudert at the time of this conversation had or had not the very information which he

was then asking you to disclose or place at his disposition?

A. I have no wish on the subject. I wish to answer as directly as I can questions which are put to me and I have no wish to be understood as saying one thing or the other.

212 Q. I repeat the last question striking out that part which refers to your wishes.

Mr. Bovee: Counsel for defendants objects to the question as incompetent, and to the matter as irrelevant and immaterial to the issues presented by the

F. 667 pleas.

A. I do not understand what is meant by a part of the question which remains after striking out about my wishes. If my recollection serves me correctly do you wish to be understood, etc.

213 Q. You are unable to make any other answer to the question than that made, is that the case?

A. I understand that my answer is a direct answer to the question.

214 Q. When Mr. Coudert applied to you to be allowed to inspect writings made by Mr. Fayerweather bearing upon the question of his will or correspondence of Mr. Fayerweather with Mr. Ritch particularly and possibly Mr. Vaughan, did you understand that he then

F. 668 had not the information for which he then applied to you?

A. I have not said that Mr. Coudert made any application to me or that he applied to me to be allowed to inspect anything. I have stated exactly what occurred. At the time of my conversation with Mr. Coudert I assumed — that was the tenor of what it said — that he did not have the memoranda and correspondence which was the subject of our talk.

215 Q. And does that refer to all the memoranda which were introduced in the Five College action and upon which the Supreme Court decided that they showed a secret trust?

Mr. Bovee: Same objections as before.

A. I think so.

216 Q. Then these executors propounded a will and codicils and persisted with the attempt to probate them without making any disclosure of the existence of these memoranda last referred to, and thereupon in the course of the contest an application was made to the Court to compel them to discover or disclose any such documents, whereupon you were employed, and thereupon ensued this conversation with Mr. Coudert; is that so far

F. 669 correct?

Mr. Bovee: We object to the question as incompetent, as calling for a conclusion; we object to the matter as irrelevant and immaterial to the issue presented by the special pleas.

A. The proposition as embodied in the question is not at all correct.

217 Q. Have you not already this morning in substance so testified?

A. I have not; I have not said that the application referred to was pending the contest; in other respects I have not made any such statement as the question assumes.

218 Q. At what stage of the probate contest

F. 670 have you said you were employed?

Mr. Bovee: Same objections.

A. I do not remember that I have said at what stage of the probate contest I was employed except in the statements that I have made that I was employed after it had begun, by which I mean after the proceedings had begun, I do not mean after the trial commenced.

219 Q. Do you wish to be understood then that so far as counsel is responsible you were responsible for the steps taken for probate prior to the application for discovery to which you have referred?

A. I have no wish on the subject one way or the other.

220 Q. What is the fact?

Mr. Bovee: Same objection.

(At the request of the witness, Question No. 220 was repeated by the stenographer.)

A. I am perfectly willing to share with Messrs. Arnoux, Ritch & Woodford and Judge Arnoux the responsibility for anything which occurred after I was retained.

F. 671 What occurred prior to that time I only know in a general way and by information. My recollection is that the motion, if there were a motion, or that whatever had occurred in respect to the discovery, was prior to the time that I was retained, and that succeeding my retainer I had a conference with Mr. Ritch and that the outcome of that was that these memoranda and writings were furnished to Mr. Coudert.

221 Q. And the precise proposition that confronted you at the time of that conference was whether you should contest the right of the contestants against the probate to have these writings under an order of the Court, or whether you should disclose such as you saw fit in order to prevent an adjudication thereupon; is it not so?

Mr. Bovee: Same objections.

F. 672 A. No, I do not know of my being confronted by anything. There was some proceeding pending at the time that I became employed and there was a question about the relevancy of certain of these papers to the probate contest, and also a question of privilege as to whether what had passed between Mr. Fayerweather and Mr. Ritch, Mr. Ritch had the right to disclose. The result of our conference was that as the application came from Mr. Coudert, it was supposed to be on behalf of Judge Rollins as well, in other words that he and Judge Rollins were acting in concert, as it came from counsel of Mrs. Fayerweather and the counsel for the ladies who were assumed to be nieces, it was not necessary to stand

upon the question of privilege. There were other matters discussed, and with the outcome which I have stated.

222 Q. Did you also reach the conclusion at that conference that there was no question of privilege to stand upon?

Mr. Bovee: Defendants object to the question as incompetent, and to the matter as irrelevant and immaterial to the issue presented by the special pleas.

A. It is pretty difficult for me, after an interval of ten years, to testify to details, but my general
F. 673 recollection is that we considered that if the papers offered for probate were proved, Mr. Ritch and his associates became executors and that gave them the right to waive a privilege, and that if the will were not proved, then there would be a right of administration or some such right on the part of Mrs. Fayerweather and that, putting the two things together, Mr. Ritch would be justified and that his counsel would be justified in advising Mr. Ritch to put these papers at the disposition of Mr. Coudert.

223 Q. You wish to be understood, or you mean to be understood that in advance of the determination whether they were executors they acted upon an assumed right to waive some privilege which it rested with them to
F. 674 waive or insist upon, do you?

Mr. Bovee: We object to the question as incompetent and to the matter as irrelevant and immaterial to the issues presented under the pleas.

(At the request of the witness, Question No. 223 was repeated by the stenographer.)

A. I have a great many times said that I have no wish on the subject, either of this or any other. I have several times said that I have no wish with respect to any subject upon which I have examined. I think that my preceding answers are perfectly clear. If there

is any want of clearness or any obscurity about them all that I can add, so far as my recollection now serves me is that, at that time, it was assumed that Mr. Coudert, who was a gentleman of the highest professional character, was acting in good faith and that he did represent Mrs. Fayerweather with full authority and that, as the request came from her the executors, more particularly Mr. Ritch, were justified in not insisting upon any privilege which they might have as against Mrs. Fayerweather. And I want to say in this connection that as long as Mr.
F. 675 Coudert had to do with the litigation he lived up to the standard of good faith to which I have testified, and would have done so down to now.

Mr. Sherman: Counsel for the complainants moves to strike out the allusion to Mr. Coudert as not responsive and on the further ground that Mr. Coudert's reputation is so well established as to derive no value whatever from any commendation whatever from John E. Parsons.

224 Q. You have been the first to speak here on an application for discovery of these papers. What did you have in your mind when you so described the matter which you introduced?

Mr. Bovee: Same objections as before.

A. Whether I have been the first to allude to
F. 676 such a proceeding it is impossible for me to tell. I have kept away from this examination so far as was possible. If what is desired to know is independent of whether I am the first to speak of the proceeding or not, what I recall about it is this: when I was retained I understood that there was either pending or some notice formal or informal had been given of some proceeding for a discovery, whether it was a proceeding in Court or a proceeding to be brought into Court I do not recall at this time. All I know is that it led to a consideration of whether the executors might comply with Mr. Coudert's wish, and that wish had been signified in some way prior to my connection with the case.

225 Q. Then there was no obstacle opposed to the submission to Mr. Coudert of Exhibit OA arising out of any consideration of privilege, was there?

Mr. Bovee: We object to the question as incompetent and calling for a conclusion and to the matter as irrelevant and immaterial to the issues presented upon the special pleas.

(At the request of the witness, Question No. 225 was repeated by the stenographer.)

F. 677

A. Exhibit OA did not come within the designation of memoranda of Mr. Fayerweather's or correspondence between him and any one and if my memory serves me correctly it was not until long after this that I saw the note and the envelope subsequently marked Exhibit OA which enclosed it. The envelope was not evidence of any kind in the recollection that I have of it; it was unintelligible and it only stated a memorandum of a conversation between Mr. Fayerweather and Mr. Vaughan which conversation was testified to by Mr. Vaughan upon the probate trial, and if I am correct in my recollection, and in this respect my recollection is refreshed by what Mr. Sherman has heretofore said, both Mr. Cou-

F. 678 dert and I inquired of Mr. Vaughan in respect of that conversation, I for one reason and Mr. Coudert probably for a different reason.

226 Q. And the version which you elicited from Mr. Vaughan in the Surrogate's contest was one intended by you to embarrass the attempt then being made to impose upon the title of the executors a secret trust by evidence tending to show that the trust was too indefinite to be carried out in accordance with the rule held upon Tilden's will and in accordance with the contention which you made in respect of the Edson will, was it not?

Mr. Bovee: We object to the question as incompetent and calling for conclusions and not facts; and the record

in the Surrogate's trial is the best evidence of what transpired there and what was testified to; and we further object to the matter sought to be elicited on the ground that it is irrelevant and immaterial to the issue presented by the special pleas.

(At the request of the witness, Question No. 226 was repeated by stenographer.)

A. No; and in saying no I do not mean to ac-
F. 679 quiesce in the propositions of the question.

227 Q. Although you say that the Exhibit OA is by itself meaningless, you well know, do you not, that if that document had been submitted to Mr. Coudert it would have led to inquiry from you as to the circumstances under which it was made, and that upon that inquiry Mr. Coudert would have learned that these apparently meaningless pencil memoranda on Exhibit OA consisted of instructions taken from Mr. Fayerweather by Mr. Vaughan on the morning of November 15th, 1890, for the preparation of a codicil to be executed that day, and which circumstance would be entirely in conflict with the version which you elicited from Mr. Vaughan that this
conversation about more institutions for benefit
F. 680 occurred on the afternoon and after the execution
of the codicil. Is it not so?

Mr. Bovee: The defendants object to the question as incompetent, as hypothetical and speculative, and as assuming facts which have not been proven, as irrelevant and immaterial to the issues presented by the special pleas, and as calling for the opinion of the witness and not for facts.

(At the request of the witness, Question No. 227 repeated by stenographer.)

A. How is it possible for me to tell what Mr. Coudert

would have done under any given condition or circumstances. Mr. Condert upon the probate trial asked Mr. Vaughan about that conversation; I can guess that if anything had called his attention to the conversation he might have asked about it; if he did do so he would have learned so far as I have any knowledge what Mr. Vaughan stated upon the probate trial whether the conversation referred to was at one time or other of the interview of November 15, 1890. I do not know and I cannot at this moment remember what was said upon the sub-
F. 681 ject. Any materiality in the view which I entertained then and entertain now about that conversation was first its bearing upon the mental condition of Mr. Fayerweather at the time. The contestants before the Surrogate the widow and next of kin, had filed objections stating that he was incompetent, etc. Its other bearing was in answer to the claim made by the colleges and by Mr. Reynolds as executor; it was that there was a secret trust in favor of colleges and that Mr. Fayerweather's wish was and that his wish down to his death was, that his residuary estate should go to the colleges named in the will with one or to exceptions, I think Lincoln University or some other college was one.

228 Q. Hampden?

F. 682 A. Well, perhaps Hampden. I thought upon trial before Judge Truax that what passed between Mr. Vaughan and Mr. Fayerweather on November 15, 1890, whether at one hour of the day or another, met this claim of the colleges and Mr. Reynolds and I tried my best, and in the end I think that I succeeded in getting in evidence all that conversation; and I make that to overcome objections made by Mr. Reynolds and the colleges through their counsel I was compelled first to get in the memorandum, the effort of the colleges and Mr. Reynolds being to exclude Mr. Vaughan's testimony on the ground that Mr. Fayerweather was dead. With reference to the barring of that conversation and whether it

did or did not constitute instructions for the codicil of that date, I recall that the position upon the Truax trial taken adverse to the executors was that that conversation did not constitute and was not intended by Mr. Fayerweather to constitute instructions for the codicil of that date, but it constituted instructions for the preparation of a future codicil, the execution of which was prevented by Mr. Fayerweather's death. I remember distinctly that Mr. Root took that position, Mr. Root at that time apparently was co-operating with Colonel James, they
F. 683 were apparently making common cause against the executors, and I have a sort of impression that Colonel James took the same position specifically; about that I will not be so sure.

Mr. Sherman: I move to strike out all of the answer after the words "how is it possible for me," etc.

229 Q. You say that Mr. Root and Colonel James made common cause in the Five College action when you also say at that time that the executors were only stakeholders and had ceased to have any interest in the litigation, and the pleadings and the course of the trial was to determine whether the colleges should take the residuary estate or whether Colonel James should take the residuary estate, Colonel James' clients should take the
F. 684 residuary estate. What do you mean by common cause?

Mr. Bovee: The defendants object on the ground that the question is incompetent, and is irrelevant and immaterial to the issues presented by the special pleas, and as assuming something which has not been proven.

(At the request of the witness, Question No. 229 was repeated by stenographer.)

A. I have not intended to say that the executors at that time had no interest; they had no individual pecuniary interest, they had an interest as executors from the

fact that as such they were parties to the litigation and they had the further interest that it was charged by Mr. Reynolds that the releases had been obtained by fraud, and the executors had every interest to satisfy the Court as they did that that charge was without foundation. You ask me what do I mean by common cause, referring to the action of Mr. Root and Colonel James. Mr. Root was the leading counsel for the colleges; other colleges were represented by other counsel in co-operation with Mr. Bishop and himself; Colonel James at
F. 685 that time was the counsel, or was assumed to be the counsel for Mr. Reynolds; It was manifest to the executors' counsel at that time, at all events I drew the inference, and that inference was confirmed by the testimony of Mr. Reynolds yesterday or at an earlier stage of his examination, that Mr. Reynolds and Colonel James were assisting the colleges; Mr. Reynolds stated that positively in his testimony and any such assistance meant assistance to the colleges against the executors, furthermore against the beneficiaries under their deed of gift.

230 Q. Well the common cause which you ascribe to Mr. Root and Colonel James is to the effect that Colonel James had certain evidence which established the
F. 686 fact that there was a secret trust, contrary to what you were then contending, and that there Root insisted on the advantage of it against Mr. Reynolds and the next of kin and in favor of the colleges for whom he was counsel?

A. I meant nothing of the kind. The papers upon which Mr. Root claimed that there was a secret trust—the papers upon which the colleges claimed that there was a secret trust were important principally in the fact that they were part of the printed record of the proceedings before the Surrogate. What information could have been furnished by Mr. Reynolds to the counsel for the colleges I do not know and cannot think; I cannot re-

member that upon the Truax trial anything was proved which the colleges did not understand perfectly without any information from Mr. Reynolds; in fact, if my memory serves me correctly, in their bill of complaint they incorporated these memoranda and writings and maintained that upon them there was a secret trust, the Court ultimately so held, and the Court ultimately held that it was in favor of the colleges, a judgment was entered accordingly, and according to the judgment of that suit to which the colleges and Mr. Reynolds were both
F. 687 parties, Mr. Vaughan's conversation about other institutions became immaterial.

231 Q. Do you not perceive, Mr. Parsons, that your last explanation to the effect that Mr. Reynolds furnished no evidence to the colleges is entirely inconsistent with your previous answer that you ascribed to him and to Mr. Root a common cause because he had furnished evidence to the colleges?

A. Your premises are wrong, and it is unnecessary therefore to answer about consistency. There is no inconsistency. To begin with I have not said that Mr. Reynolds furnished information to the colleges; I alluded to the fact that he swore that he had done so, and that I could not conceive what information he could have
F. 688 furnished for the reason that it was all a matter of public record and had been for years before. I am careful to discriminate between what occurred and the testimony of Mr. Reynolds with respect of matters, both about which I do know and about which I do not.

232 Q. Are you careful to discriminate between what actually occurred and the testimony of your client Henry B. Vaughan as to what occurred?

Mr. Bovee: I object to the question as incompetent.

A. I am not aware of any such discrimination.

233 Q. You stood by in the Surrogate's Court and you heard Mr. Vaughan testify respecting the conversation with Mr. Fayerweather wherein the phase occurs in sub-

stance, we must put our heads together and find more institutions for benefit, and you heard him testify that that occurred in a long interview which he had on the afternoon of November 15, 1890, and after the execution of the codicil that day; and you did not interpose; and when your turn came to examine him you did not remind him or ask any question tending to remind him that the fact was that that conversation occurred on the morning of November 15th and as preliminary to the execution of the codicil of the 15th, is it not so?

F. 689

(At the request of the witness, Question No. 233 was repeated by stenographer.)

A. When the conversation occurred I do not know, I never did know. It is impossible that I should know. My information about it was in the testimony which Mr. Vaughan gave. I never have looked to see whether according to Mr. Vaughan's testimony the conversation was at one period of the day or another. In the view which I then entertained and which I now entertain, the question was of the wishes of Mr. Fayerweather down to his death, and that would make it immaterial when the con-

F. 690 versation was; but standing by or interposing or something of that kind about which the question asks, I assume that a reference is intended to the testimony about that conversation which Mr. Vaughan gave on the Truax trial.

234 Q. No, upon the Surrogate's trial?

A. It was with great difficulty that I got into evidence any conversation upon that trial; Colonel James on behalf of Mr. Reynolds insisted against the testimony and argued that it was immaterial or unnecessary to consider the matter.

Mr. Sherman: Counsel for the complainants moves to strike out all the answer, and repeats the question stat-

ing again that the occasion referred to in the question as to Mr. Parsons standing by is intended to refer not only to the Truax trial but to the probate contest before the Surrogate.

The Witness: I submit then that counsel ought to put his questions in manner which corresponds with his intentions. If he intends by his preceding question to limit it to what occurred before the Surrogate I had no knowledge or information about that conversation outside of that to which Mr. Vaughan then testified.

F. 691 235 Q. Do you mean to be understood that between the time when Mr. Vaughan testified in the Surrogate's contest and to the time when in the Five College action you introduced the subject of Exhibit OA and the attendant conversation you received other and different information about it than you had at the time Mr. Vaughan was examined in the Surrogate's contest?

A. I have meant to say what I have, and I have no meaning about being understood one way or the other in reference to it.

236 Q. Do you mean that you intend your answers to convey no meaning or information?

Mr. Bovee: Defendants object to the question as incompetent, as insolent and as utterly irrelevant

F. 692 and immaterial to any issue in this case.

The Witness: Am I to state my meaning?

Mr. Sherman: I want you to answer this question if you will and then I will ask another one.

A. I have—

Mr. Sherman: Strike that out.

The Witness: I am willing to answer.

Mr. Sherman: I am not willing to waste time.

The Witness: It is all a waste of time.

Mr. Sherman: That will appear hereafter.

237 Q. Between the time when Mr. Vaughan testified in the Surrogate's contest, and the time when in the Five College action you introduced the subject of Exhibit OA

and the attendant conversation, did you receive other and different information about it than you had at the time Mr. Vaughan was examined in the Surrogate's contest?

Mr. Bovee: Same objections as before.

A. This question if I understand it correctly calls upon me to testify what passed between my client, Mr. Vaughan, and myself and meets an objection which has time and again been taken during this examination by the counsel who puts the question. I do not take such an objection because I know Mr. Vaughan well
F. 693 enough to be satisfied that he would not ask me to abstain from answering the question, and relying upon his assumed assent I state that I have no recollection that any information came to me upon the subject from the time of the probate trial down to the time of the trial before Judge Truax. The only source from which information could come was Mr. Vaughan, and I do not remember that I had any conversation with him upon the subject. I had the probate record before me or in my possession.

238 Q. Mr. Parsons, has your last answer been given seriously and with any recollection on your part that you are under oath?

A. The question like the conduct of this proceed-
F. 694 ing on the part of the counsel who asks it from beginning to end is most insulting and most offensive, and in the view which I entertain of it can have but one bearing and that is the attempt to get offensive questions and offensive statements upon the record to coerce on the the part of somebody to buy off this sort of persecution. Every answer which I have given has been given seriously. Every answer which I have given has been given in recollection that I am under oath. I have already objected to the assumption that the testimony that I have given is not under oath and I object again and protest against it.

239 Q. In giving this answer you have in mind, have

you that in the answer referred to in the question you made an extended comment upon what you assert to have been the course taken by counsel for complainants which was not asked you, and that you also elaborated an explanation of why you did not raise the statutory objection of privilege and thereupon showed that there was no occasion for privilege inasmuch as nothing had occurred; you have that in mind have you when you make the last answer?

Mr. Bovee: Defendants object to the question as
F. 695 insolent impertinent, and incompetent.

(At the request of the witness, Question No. 239 was repeated by stenographer.)

A. No, I did not have in mind what the question assumes. What I had in mind was —

Mr. Sherman: I object to any further answer because that question is answered, and I further protest against the prolonged evasive and improper argument introduced by this witness upon the record under the pretense of answering questions or giving a reason for not answering them, no one of which matters is asked of him by counsel for the complainants.

F. 696 The Witness: What I had in mind was that the question asked and was intended to inquire about what had passed and whether anything had passed between Mr. Vaughan and my client and myself, and if I am correctly informed about the law, and I hear now for the first time a suggestion to the contrary, the privilege exists to the entire subject. Is not that the law, Bovee?

Mr. Bovee: I do not know, there have been so many version of this —

Mr. Sherman: I hope you are putting this colloquy upon the record?

Mr. Parsons: No —, well, put it upon the record. This may go upon the record if you wish, Mr. Sherman.

The Witness: I once tried to examine Judge Rapallo when he was a judge of the Court of Appeals and that very question arose, and Judge Rapallo stood upon his privilege under precisely these circumstances. I do not know whether he was right or wrong. I thought at the time he was right and I still think so.

240 Q. Is that all you desire to say upon the subject?

A. I do not desire to say that. You having challenged my opinion I refer to authorities.

Mr. Sherman: I move to strike it out as not testi-
F. 697 mony and not called for, as being not the source from which the law is to be ascertained, and because the Court requires no information from the counsel as to the law, and because the law acquires no particular vigor or force because John E. Parsons swears to it as a witness.

241 Q. Have you said Mr. Parsons in substance to-day that Exhibit OA was by you regarded as embodying instructions for a codicil which it turned out there was not time to execute?

A. I have not said so.

242 Q. Have you not said that in substance?

A. I have not.

243 Q. Have you said nothing which affords
F. 698 that meaning?

A. Nothing. I have said that Mr. Root, and I thought that Colonel James also, certainly Mr. Root took that position.

244 Q. Did I at any time ask you any question which you understood to be an inquiry what position Mr. Root or Colonel James took in reference to the Exhibit OA or its application or effect?

(At the request of the witness, Question No. 244 was repeated by stenographer.)

Mr. Bovee: Defendants object upon the ground that

it is not for the witness to say as to what counsel for complainants has asked, the record will show what has been asked; also that it is irrelevant and immaterial to the issues presented by the special plea.

A. I have understood the counsel to put questions to me about or assuming or implying what may have been or was the bearing of the conversation of November 15th, 1890, whether made at one time of the day or at another, and the bearing was a subject of argument before Judge Truax, and it was in that connection that I alluded
F. 699 to what was claimed on behalf of his clients by Mr. Root, one or the other or both, to be the bearing. I have also explained what in my judgment was the bearing of that conversation looked at from my standpoint.

245 Q. Do you know any fact which indicates that Exhibit OA contains the memoranda embodying or embracing any instructions given by Mr. Fayerweather to Mr. Vaughan for a codicil other than the codicil dated November 15th, 1890, and which has been admitted to probate?

Mr. Bovee: We object to the question as incompetent and to the matter as irrelevant and immaterial to the issues presented under the special pleas.

A. I have no knowledge upon the subject. If
F. 700 the question means to ask whether I have information I am willing to answer. But I think after the objection which has been made I will stick to the letter of the question and not endeavor to answer according to what I assume to be the intention of counsel.

246 Q. Have you information of any fact which has not been testified to in the Surrogate's contest by any witness which has a tendency in your opinion to show that Exhibit OA embraced instructions given by Mr. Fayerweather to Mr. Vaughan for the preparation of a codicil, other than the codicils admitted to probate, dated on the 15th of November, 1890?

A. If counsel intends by his question to ask about

my opinion, I am willing to give it, although it is impossible for me to conceive what relation it can have to the existing controversy; I am also willing to stake the extent of my information if that is what the question asks, but I am not willing to make answers intended to meet what I assume to be the intention of the question, wait until the counsel has heard them, and then have him object to them.

247 Q. When you offered Exhibit OA in evidence in the Truax trial had you any reason to believe that it
F. 701 embodied or embraced instructions given by Mr. Fayerweather to Mr. Vaughan for the preparation of a codicil, other than that admitted to probate, dated November 15th, 1890?

Mr. Bovee: Defendants object to the question as incompetent and as calling for opinions and conclusions and not facts and as irrelevant and immaterial.

(At the request of the witness, Question No. 247 was repeated by stenographer.)

A. What I have reason to believe I am willing to state if that is what the counsel desires to know. It is impossible for me to answer the question if my
F. 702 recollection of it is correct by a mere yes or no.

248 Q. Can you not answer a question whether you had or had not reason to believe a given thing at a definite date by yes or no?

Mr. Bovee: We object to the question as incompetent.

A. It depends upon whether the proposition as to which I am to assent — it depends upon the proposition as to which I am to give assent; the proposition may contain some elements bearing one way and some bearing another.

249 Q. Do you recall any statement made by Mr. Vaughan upon the Truax trial in substance or effect that the instructions that he received from Mr. Fayerweather

on the morning of November 15th, 1890, and as to which he made memoranda upon Exhibit OA were instructions for any other codicil than the codicil dated November 15, 1890, and which has been admitted to probate?

(At the request of the witness, Question No. 249 was repeated by stenographer.)

A. I can recall in a general way the testimony which upon the Truax trial Mr. Vaughan gave; I can
F. 703 recall what at that time I assumed to be its effect. If that is what is desired by the question I am ready to make answer. The Truax record would show exactly what Mr. Vaughan did testify to.

250 Q. And did you ever have any information from Mr. Vaughan of any different state of facts in relation to the subject last asked about from that embodied in his testimony in the Truax trial?

Mr. Bovee: We object to the question as incompetent and as calling for the conclusion and opinion of the witness and not facts, and as irrelevant and immaterial.

A. The counsel putting the question to me has heretofore raised a question about the application to what occurred between Mr. Vaughan and myself of the
F. 704 privilege to which I have referred, and I think that before I answer another question bearing upon that subject I will ask him whether he considers that I am privileged to answer. I will answer if he says I am not privileged.

251 Q. Do you understand Mr. Parsons that the privilege is a thing which may be waived by the clients?

A. Yes.

252 Q. Do you understand that when it is once waived it is waived forever?

A. No. It may be waived in respect of certain matters and in respect of certain issues, and it may not be waived in respect of others. It is a privilege which

belongs to the client as I understand whenever he sees fit to assert it; at all events that is the view upon which I am going to proceed.

253 Q. Mr. Vaughan was called as a witness and testified upon this topic in the Five College action at your instance as his counsel, was he?

A. Yes.

254 Q. And with his assent?

Mr. Bovee: We object to this inquiry. The record in the Truax trial is the best evidence of what tran-
F. 705 spired there.

A. With his implied consent, I do not know whether I went through the form of asking him whether he consented or not.

255 Q. Well you got sufficiently by the privilege objection to have his testimony upon this subject given fully, did you not?

Mr. Bovee: Same objection.

A. No, the present question, or the question now under consideration, asks in respect of information outside of that which appeared upon the Truax trial, if it is within my power or comprehension to understand what the counsel either asks or means.

256 Q. Do you understand the privilege to en-
F. 706 title Mr. Vaughan to disclose on his own behalf as much as he pleases of the conversation between him and Mr. Fayerweather respecting the preparation of Mr. Fayerweather's codicil, and that then he can withdraw into his shell under the protection of privilege and decline, or his counsel for him decline, to submit to any further examination than the one which Mr. Vaughan chooses to put forth in Court?

Mr. Bovee: Defendants object as irrelevant and immaterial.

A. I understand that there is no conceivable basis for the assumption of the question and that there is no justification for its assumed conclusion. The privilege

about which I am talking is the privilege which Mr. Vaughan controls with respect to what I shall testify to, and I have tried to make that apparent, but apparently I have only succeeded in making counsel understand that it has something to do with Mr. Vaughan's relations to Mr. Fayerweather. I confess that while I have had long experiences —

Mr. Sherman: I object to the confessions of counsel because they will not be as full and satisfactory as we desire.

F. 707 The Witness: All right, leave out the confession. May I add that while obviously the time of other people concerned here is not valuable, mine is.

257 Q. Mr. Parsons, are you being paid for your time spent here?

Mr. Bovee: We object to it as irrelevant and immaterial and insulting.

Mr. Sherman: Oh, on the contrary; on the contrary.

Mr. Bovee: And none of the counsel's business whether the witness is compensated or not and I advise the witness not to answer impertinent questions of that character.

The Witness: The question asks whether I am — underscore am — being paid. I am not being paid. If the counsel wants to know whether I expect to be paid

F. 708 for the services which I render in this litigation, I do not know that I have any objection to telling him, but this I will say, that Fayerweather litigation to me has been most unprofitable, and that I can use my time to vastly better advantage than wasted in this way.

258 Q. I asked you the last question with a feeling of regret that your time was being wasted without sufficient remuneration to you, and I take the liberty of suggesting that if you will answer my questions categorically where it is possible, and as briefly and as responsively as you can, it will probably save a great deal of your time and and that of the others whose time is so much less valuable than yours?

A. I decline to be admonished by counsel, and I decline to answer categorically questions which are so phrased as to be incapable of categorical answers.

259 Q. Now Mr. Parsons when the question of delivering up papers or submitting to Mr. Coudert papers bearing upon the will contest was under consideration, is it not true that it was under consideration by you and your associate counsel whether Exhibit OA should be included, or rather the paper which subsequently was marked Exhibit OA in the Truax trial ... ald be included in
F. 709 the disclosure to Mr. Coude.., and the determination was reached not to disclose it to him because he had so phrased his request as to call for writings by Mr. Fayerweather or correspondence between Mr. Fayerweather and Mr. Ritch particularly and possibly Mr. Vaughan, is it not so?

A. Nothing of the kind. I have already said that I have no recollection that at the time of this conference with Mr. Coudert I had seen that memorandum.

260 Q. Were such papers as were placed at Mr. Coudert's disposal so placed by you prior to the time when, as you have testified upon the Dayton reference you attended upon the chance that it might be called for with this envelope?

F. 710 Mr. Bovee: We object to the question as incompetent and to the matter as irrelevant and immaterial.

(At the request of the witness, Question No. 260 was repeated by stenographer.)

A. My recollection would be that after the conference with Mr. Ritch to which I have testified, the papers that were sent to Mr. Coudert went to him from Mr. Ritch. My recollection would be that that was before the beginning of the probate trial; my recollection would be that with my papers for the probate trial was included

everything which I had in my office bearing upon the subject and I assume that as that letter I think with the envelope was among my papers it was then taken into the probate court. I do not know what else I may have had in my possession, but I do know that everything which I had in my possession, so far as I can now recall, was taken into the probate court.

261 Q. Mr. Parsons at that time you had had a practice of very great scope, importance and variety connected with the probate of wills, had you not?

F. 711 A. I decline to testify about my practice in any such matters or any other matters.

262 Q. And you were then fully informed and experienced in regard to what was competent and what was not competent evidence upon the factum of a will, were you not?

A. I decline to be examined upon the character of my practice and what my opinion was upon various subjects except in so far as they may be relevant here.

263 Q. And you know very well, did you not, that Exhibit OA, if it did contain or embody instructions which had been given by Mr. Fayerweather to Mr. Vaughan on the morning of November 15th, 1890, for a codicil to be executed, and the instructions connected there-

F. 712 with, were most important evidence in relation to the factum of a codicil executed on that day and subsequent to the instructions, did you not?

(At the request of the witness, Question No. 263 was repeated by stenographer.)

A. I never to my recollection ever had any such understanding about the conversation of November 15th, 1890, to which the memorandum refers. My recollection is,—I will anticipate Mr. Sherman what you are looking for and tell you what my recollection is—my recollection is, that the position of the executors was that the devise

to them was absolute and that there was no intention at any time by Mr. Fayerweather to execute a codicil which should be in favor of other specified institutions. There was the question of what wishes Mr. Fayerweather might have outside of a codicil. That is my present recollection and I do not think that I can be mistaken about it.

Mr. Sherman: I move to strike out that part of the answer commencing "my recollection is" as not responsive and incompetent.

264 Q. Was it with your approval that a letter
F. 713 was written by Mr. Ritch to Mr. Coudert containing a proffer of papers for inspection after the motion had been made and before it was decided in the Surrogate's Court wherein occurs this language: "In order to avoid any misunderstanding Mr. Ritch has submitted to Mr. Parsons, personal counsel to Mr. Bulkley and Mr. Vaughan, all of these memoranda, and with his concurrence he is prepared to furnish them for your inspection in advance of their production in Court, all that Mr. Parsons or Mr. Arnoux have selected as coming within the prohibition of the Statute; and if your representative will call on Mr. Fiske at our office this afternoon at one o'clock they can be seen."

Mr. Bovee: I object to the question as incompe-
F. 714 tent and as assuming something which has not been proven, and as irrelevant and immaterial to the issues presented by the special pleas.

(Question No. 264 repeated by stenographer at the request of witness.)

A. If I see any such letter I may be able to answer.
265 Q. As the result of your conference did you give instructions or authority to write any such letter or to make any such communication to Mr. Coudert?

A. I can state my recollection upon the subject if that is desired.

266 Q. Yes, upon the subject.

A. My recollection is that in my conference with Mr. Ritch it was understood that papers were to be furnished to Mr. Coudert. I remember that something was said about privilege, but what course was adopted with reference to privilege aside from the testimony which I have previously given I cannot remember. I have stated what was in my memory after ten years.

267 Q. Was there a conclusion reached that this paper which has been marked Exhibit OA should be
F. 715 held as coming within the prohibition of the Statute?

A. No. I do not mean by that answer to imply that there might not have been a question as to whether it did come within the prohibition. I mean to answer the question strictly.

268 Q. But that was not the reason for which Exhibit OA was not submitted to Mr. Coudert?

A. There was no reason one way or the other. I have already said a number of times that I have no present recollection that at that time I had observed the memorandum.

269 Q. Did you give Mr. Coudert to understand that you had given him possession or access to all the
F. 716 evidence which could bear upon the subject before the Surrogate?

Mr. Bovee: We object to the question as incompetent, as calling for a conclusion, and as irrelevant and immaterial.

(At the request of the witness, Question No. 269 repeated by stenographer.)

A. If what is desired is to know what passed between Mr. Coudert and myself I am willing to state it. I meant him to understand exactly what was then stated.

270 Q. Have you already stated it?

Mr. Bovee: We object; the record will show what the witness has already stated.

A. Have I already stated what?

271 Q. All the conversation with Mr. Coudert in which you gave him such information as you did give him as to whether he had possession of or access to all the evidence which could bear upon the subject before the Surrogate?

A. I have not already stated it.

272 Q. Have you anything to add to the statement which you made in regard to your conversation
F. 717 with Mr. Coudert on that subject which will make the conversation complete?

Mr. Bovee: We object to the question as incompetent.

A. My conversation with Mr. Coudert was preliminary; it was before any papers were submitted to him; it was when, so far as I now recall, I did not know what the papers were except as I might have inferred it from my understanding that some motion had been made, possibly I saw the papers in the motion, that I do not remember.

273 Q. Mr. Parsons you have stated a number of times with great precision that what Mr. Coudert asked for was writings by Mr. Fayerweather relating to his will and correspondence between Mr. Fayerweather and Mr. Ritch and Mr. Vaughan. Are you undertaking after
F. 718 this lapse of time to say that that is precisely what Mr. Fayerweather asked for or in those terms or that in substance?

A. I am answering your questions according to my best recollection after this lapse of time; I am not undertaking to do anything.

274 Q. Then you do not say positively that those were the terms in which Mr. Coudert asked for the papers?

A. If your question implies an inquiry whether I am stating language, I am not stating language.

275 Q. Are you positive that Mr. Coudert's request was not in terms broad enough to embrace the request for the

production of the paper which has been marked Exhibit OA in the Truax trial?

A. I have no recollection that it is broad enough to indicate any such idea to me. The memorandum was not a writing by Mr. Fayerweather or a writing of materiality of any kind so far as I then understood and understand now, except in so far as it might refresh Mr. Vaughan's recollection or corroborate his recollection if it were disputed. If Mr. Coudert asked me about Mr Vaughan's conversation on November 15th, 1890, with Mr.
F. 719 Fayerweather and I knew about it at that time I certainly told him, but I have no recollection that such was the case.

276 Q. If, as Mr. Vaughan testified, the memorandum was taken down as the substance of instructions given by Mr. Fayerweather on the morning of November 15th, 1890, for a codicil to be prepared, and if therein Mr. Vaughan acted as agent for Mr. Fayerweather in order to communicate his wishes to a lawyer, was it not a purely verbal distinction which you made in withholding that paper from Mr. Coudert because the paper was not written by Mr. Fayerweather?

Mr. Bovee: The defendants object to the question as hypothetical and incompetent and to the matter
F. 720 as irrelevant and immaterial to the issue.

(At the request of the witness, Question No. 276 was epeated by stenographer.)

A. I do not know that Mr. Vaughan gave such testimony as the question assumes. The counsel apparently has the record before him and before answering the question I would like him to point out to me any such testimony by Mr. Vaughan.

277 Q. Is that the only reply you will make to that question?

A. I cannot reply upon the hypothesis of such tes-

timony unless I learn in some way that such testimony was given. That is a very simple matter to settle, the counsel has the testimony before him I assume, and I have it in my possession and can refer to it if desired.

278 Q. Do you decline to answer the last question otherwise than as you have answered it?

A. I decline to answer a question which assumes that Mr. Vaughan gave such testimony unless my attention is called to such testimony as given by him. I am not going to answer upon the hypothesis stated

F. 721 by counsel of testimony stated by Mr. Vaughan. I prefer to go to the record. I think according to my recollection the record will show that Mr. Vaughan did not give such testimony. However, it is a simple thing to refer to a record. The counsel can do it.

279 Q. When, in the Surrogate's contest Mr. Coudert said—

The Witness: Mr. Sherman, may I answer that question further when I have had an opportunity to examine the record to see whether Mr. Vaughan gave such testimony?

Mr. Sherman: I prefer that you may answer as you go along in the way that you are going.

The Witness: Then I must state according to my

F. 722 recollection that what the counsel incorporates in the question as testified to by Mr. Vaughan and my recollection of the testimony that Mr. Vaughan gave, the two do not agree.

280 Q. Have you a positive recollection that they do not agree?

A. I have no other recollection than that which I have stated. I have asked the privilege of referring to the testimony, and counsel has denied it to me. I have asked him to refer to the testimony and he has declined, I cannot remember exact details at this date; the record will show.

281 Q. I call your attention to the Surrogate's record at page 423—

A. I understood that the preceding question applied to the Truax trial, but whether it applied to either or both, my answer would be the same.

282 Q. I call your attention to the Surrogates record at page 423:

"Mr. Coudert: Shall I read that letter?

"The Surrogate: Yes.

"Mr. Coudert: (reading):

F. 723 "Arnoux, Ritch & Woodford,

18 Wall St., N. Y., November 13, 1890.

"My dear Miss Joyce:

I have had two long talks with Mr. Vaughan Friday and yesterday and I fear Mr. Fayerweather is worrying over his business matters. Mr. Vaughan says that Mr. Fayerweather is too ill to be seen and so I would be glad to have you say to him if you think it well, that I will execute any papers, or say anything in your presence, or in that of any one else, that will enable him to feel his wishes will be carried out to the letter. It would be a misfortune indeed to me to lose his confidence after so many years through any misunderstanding now.

F. 724 The will and codicils provide carefully for the institutions in which he was interested, and for the relatives and friends to whom he was attached, and I knew that at the time the papers were drawn the reasons for each paragraph were known and approved by him, the object being to prevent any contest. I write this to you because you have known of Mr. Fayerweather's affairs and I believe that you as well as he believes that I have only tried to do my duty. If at any time you or Mr. Fayerweather want to see me I will call.

Sincerely yours,"

"That is signed by Mr. Ritch.

"Mr. Parsons: I think you had better give Mr. Ritch's signature.

"Mr. Coudert: It is signed Thomas G. Ritch. It is conceded all to be in Mr. Ritch's handwriting.

"Mr. Parsons: Yes.

"Q. Mr. Ritch states in this letter of the 13th that he has had two long talks with you. A. I think that date is a mistake.

"Q. What do you think was the date? A. I think the letter must have been written on the 14th.

F. 725 "Mr. Coudert: Where is the envelope of this?

"Mr. Arnoux: Mr. Ritch says that is correct, it was the 14th.

"Mr. Parsons: It was the Friday."

282½ Q. Did not Mr. Coudert call upon you for that envelope in that way?

Mr. Bovee: The defendants object to the question as incompetent in that it incorporates matter from the record of the Surrogate's Court which has not been proven here, the record of the Surrogate's Court not being in evidence and therefore it is incompetent for counsel to frame a question without that record being in evidence here. We also object to the matter as irrelevant and immaterial to the issue presented by the special plea.

F. 726 Mr. Sherman: The counsel for the complainants calls upon the Examiner to mark the record referred to so that the truth of the matter may appear.

Mr. Bovee: As an Exhibit?

Mr. Sherman: Yes.

Mr. Bovee: In evidence in this case?

Mr. Sherman: It has been introduced and identified.

Mr. Bovee: Is the record of the testimony in the Surrogate's Court now offered in evidence in this case by the counsel for the complainants?

Mr. Sherman: When I have an occasion to make an offer of proof, Mr. Bovee, I am perfectly well acquainted with the method of doing it.

Mr. Bovee: Counsel for defendants state that throwing down a book upon the table and asking to have it marked is not the proper method of introducing in evidence an exhibit.

Mr. Sherman: Mark it for identification.

Mr. Bovee: And until the counsel does offer the record in evidence in a proper way the defendants will insist upon their rights.

Mr. Sherman: I want it marked for identification, that page 423.

F. 727

(Page 423 was marked "Complainants' Exhibit, No. 1, for Identification, January 30, 1901, C. B.)

Mr. Bovee: Counsel for the defendants object to reading in evidence here an isolated paragraph or extract of a record without introducing the entire record. We further object that it is irrelevant and immaterial to the issue presented upon the special pleas and incompetent.

(At the request of the witness, Question No. 282 was repeated by stenographer.)

A. If what the counsel has read states what oc-

F. 728 curred Mr. Coudert did exactly what he appears to have done. Whether that states correctly what occurred I cannot tell from memory.

283 Q. Did Mr. Coudert ask "Where is the envelope of this?" in your hearing and while you had in your possession in the Surrogate's Court the envelope which was afterwards marked OA?

A. I have exhausted my memory upon that subject. I have testified to all that I can recall. I have said that some question arose about a date, and that in some way the date was settled. The details I cannot recall; certainly not without reference to the stenographer's minutes.

284 Q. Did you look at the postmark on the envelope before you made the concession "It was the Friday?"

Mr. Bovee: We object to it as irrelevant and immaterial to the issues here.

A. Probably not, because I do not suppose that a postmark would give a day. I think that there was some mistake about a date and that it was corrected by some statement of the narrative of occurrences or the sequence of occurrences, but upon that subject I do not care to rely upon my memory.

F. 729 285 Q. Do you think that the postmark upon the envelope of a letter mailed in the city of New York and which letter purported to be dated November 13, 1890, but which it was contended was written on the 14th would not indicate whether it had reached the post office on the 13th and thereby indicate whether it could or could not have been written on the 14th?

A. No.

286 Q. Did you make the concession that "it was the Friday," contrary to the fact in order to divert Mr. Coudert from his request for the envelope?

Mr. Bovee: We object to the question as incompetent; the record in the Surrogate's Court is the best evidence of what was done there; and as calling for the

F. 730 opinion and conclusion of the witness; and as irrelevant and immaterial.

(At the request of the witness, Question No. 286 was repeated by stenographer.)

A. No. I do not know whether it was or was not contrary to the fact, and I did nothing to divert Mr. Coudert's attention.

287 Q. Mr. Parsons it would appear upon the production of this envelope by the postmark presumably whether the letter was written on the Friday as you admitted or not, and in your absence your associate counsel has refused

upon demand of complainants' counsel to produce that envelope. Did he represent your views as well as his own in taking that objection or making that refusal?

Mr. Bovee: Counsel for the defendants object to the question as incompetent, irrelevant and immaterial.

A. I do not know whether that will appear or not, and I decline to answer on such a hypothesis. I can state my recollection if that is what is desired.

288 Q. Have you not testified that the question of the existence of a secret trust which was attempted to
F. 731 be litigated in the Surrogate's contest was upon your opposition held not to be within the inquiry before the Surrogate?

Mr. Bovee: I object to the question as incompetent. What the witness has or has not testified to is best shown by the record. I object to it as irrelevant and immaterial.

A. If I have given testimony upon the subject I have not testified as implied in the question.

289 Q. And is the fact as stated in the question or otherwise?

Mr. Bovee: Same objection.

A. I can state what the fact is if that is desired.

290 Q. I desire it in relation to that proposition
F. 732 merely.

(At the request of the witness, Question No. 288 was repeated by stenographer.)

A. I do not remember that the Surrogate held one way or the other in reference to the matter; the testimony was received; in the end the Surrogate admitted the will and codicils to probate; this might or might not proceed upon his judgment that the question of a secret trust was not before him; the question might arise upon objections to testimony, whether it did or did not I do not recall; but I am perfectly satisfied that all of the tes-

timony came in, and according to my present recollection of the judgment which I then entertained, there was a right to have it come in as bearing not alone on the question of a secret trust, but of the mental capacity of Mr. Fayerweather as acts done by him relating to the execution of his testamentary papers. I have been told that the Surrogate outside of the record expressed an opinion on the subject of a secret trust, but I do not understand that to be inquired about.

Mr. Sherman: I move to strike out all the answer
F. 733 commencing "The testimony was received" as not responsive; and I protest against the protracted argumentative and non-responsive answers of the witness to the questions.

291 Q. When you say that all the evidence was received you do not mean that Exhibit OA was received in the Surrogate's contest, do you?

A. I would not call that evidence.

292 Q. Well, whatever you call it, that paper was not submitted to the operation of the mind of the Surrogate in any form, was it?

Mr. Bovee: Counsel for defendants object upon the ground that the record before the Surrogate is the best evidence of what was or was not received and the
F. 734 proceedings in relation thereto; also as irrelevant and immaterial to the issues here.

(At the request of the witness, Question No. 292 was repeated by stenographer.)

A. The conversation to which it related was submitted to the Surrogate in what I understood to be a complete form. If the question asks whether the memorandum was in evidence before the Surrogate, I have answered a great many times that it was not.

293 Q. I will ask you to state what you are willing to testify positively was said by Mr. Vaughan in reference to that conversation in the Surrogate's Court?

Mr. Bovee: We object to it as incompetent; what Mr. Vaughan testified to on the contest in the Surrogate's Court is best shown by the record which the counsel now has before him; and as irrelevant and immaterial.

(At the request of the witness, Question No. 293 was repeated by stenographer.)

A. If the question asks for language, I will not undertake at this interval without refreshing my
F. 735 memory to state positively anything. If the question asks my recollection of what was said, that I will state.

294 Q. Have you recently read the testimony in the Surrogate's contest?

Mr. Bovee: We object to it as immaterial.

295 Q. And if so how recently?

A. Yesterday or at a previous stage of the examination of Mr. Reynolds I read a passage from the argument of Mr. Coudert, the record will show what, because I incorporated it in a question put to Mr. Reynolds. In the same connection I read a question and answer on the examination of Mr. Vaughan bearing upon the destroyed codicil. I think that is the extent of any recent
F. 736 examination by me of the record of the probate trial.

Mr. Sherman: Do you desire to take a recess?

Mr. Parsons: How much longer will my examination take?

Mr. Sherman: I should think three or four hours longer if the answers are moderately short or responsive.

Mr. Parsons: I think I would rather go on for a while longer.

296 Q. In commenting on the decision as to the existence of secret trusts in your testimony, did you not state in substance that there was no evidence of a meeting of minds between Mr. Fayerweather and Mr. Bulkley or Mr.

Vaughan on the subject of the disposition which they should make of the residuary estate?

Mr. Bovee: We object to the question as incompetent; what the witness has testified to is a matter of record and he cannot be now called upon to testify to what he has testified; and as irrelevant and immaterial.

(At the request of the witness, Question No. 296 was repeated by stenographer.)

F. 737 A. I do not remember that I have commented upon anything in my testimony, if by my testimony is meant my present examination by Mr. Sherman.

297 Q. Have you not undertaken to include in what purported to be an answer to a question a comment on the propriety of a decision in the Five College action in reference to the existence of secret trusts, stating as a reason why that decision was erroneous, that there was no meeting of minds between Mr. Fayerweather and his executors respecting his disposition of his residuary estate or that in substance?

A. I alluded to the fact among other things that according to the information I had or the testimony, Mr. Fayerweather or Mr. Bulkley never saw each

F. 738 other upon the subject, and I implied that if it were within my judicial power to overrule the decision of a Court which held that there was an agreement between Mr. Bulkley and Mr. Fayerweather I would have overruled that decision. I never did believe that there was such an agreement and I do not any more believe it now. I never did believe, and I no more believe it now, that Mr. Ritch or Mr. Vaughan or anybody had any authority from Mr. Bulkley in respect of a matter when nothing had ever occurred between them and Mr. Bulkley in respect of the matter and Mr. Bulkley did not know anything about it.

298 Q. Did the answer of Messrs. Bulkley and Vaughan

interposed in the Five College action, signed by your name as one of the attorneys, and wherein they denied the existence of any secret trust or secret agreement, have your sanction and approval?

Mr. Bovee: We object to it as incompetent, irrelevant and immaterial.

(At the request of the witness, Question No. 298 was repeated by stenographer.)

F. 739 A. The answer had my approval. The answer I presume was signed with the name of my firm. Not only was there that approval of it, but my direct approval.

299 Q. Did you interpose that answer with full knowledge of the existence of the memoranda upon which the decision was reached in the Five College action declaring that there was a secret trust?

Mr. Bovee: We object to the question as incompetent, as calling for conclusions and opinions, and to the evidence as irrelevant and immaterial.

(At the request of the witness, Question No. 299 was repeated by stenographer.)

F. 740

A. I presume that I had full information about those memoranda. There may have been some exception, but I do not recall it, but it is my memory at the present time that the memoranda were all before the Surrogate. Of course I had information about them.

300 Q. What paper or statement which you were informed emanated from or was made by Mr. Fayerweather justified you in diverting his residuary estate to the beneficiaries specified in the deed of gift which you prepared?

Mr. Bovee: Counsel for the defendants object to the question as incompetent as calling for a conclusion and an opinion from the witness, and as irrelevant and immate-

rial to any possible issue in this case either upon the special pleas or of the case at large.

A. I did not divert his residuary estate; I had to do with the preparation of an instrument by which Messrs. Bulkley, Ritch and Vaughan made a certain disposition of any interests which they might have, they taking care in that instrument not to positively assume that they had any such interests. The paper or statement signed by Mr. Fayerweather which I had was Mr. Fayerweather's will and a series of codicils, all of which
F. 741 were directly in accord with the position which I took.

301 Q. Is that as complete an answer as you can make to that question?

A. No, I can say more if it is desired.

302 Q. I desire no more which is not responsive and which does not state a paper or statement written or made by Mr. Fayerweather?

A. I think that I can refer to another paper or statement made by Mr. Fayerweather. I think that there was a memorandum made by him which stated exactly what he wished to go to Mrs. Fayerweather and to others, perhaps Miss Joyce, perhaps Miss Emma Fayerweather, perhaps Mrs. Achter, and that that fortified the
F. 742 position that Mr. Fayerweather intended that his will declared, and that so far as concerned a trust, the existence of which would enable anybody, Mrs. Fayerweather's executor if you please, to defeat Mr. Fayerweather's wishes, it was significant; I mean the memorandum was significant that Mr. Fayerweather intended exactly what his will and codicils said.

303 Q. But did you not insert in the deed of gift a number of donees as to which his will and codicils and any paper ever attributed to him were silent?

Mr. Bovee: Defendants object upon the ground that the question is incompetent in that it incorporates a matter contained in the deed of gift which has not been in-

troduced in evidence, and the deed of gift is the best evidence of what that contains and as irrelevant and immaterial.

(At the request of the witness, Question No. 303 was repeated by stenographer.)

A. If the question asks whether the donees under the deed of gift were mentioned in Mr. Fayerweather's will and codicils for the benefits which the deed
F. 743 of gift specified, they were not mentioned in the will or codicils. The will and the codicils gave the residuary estate to Messrs. Bulkley, Ritch and Vaughan, and if that meant what the paper said, it was for them to determine what they should do with the estate.

304 Q. All this comes to this, does it not, that the addition of these donees to the beneficiaries expressly mentioned in any of these papers was the act and choice of the executors and yourself and not directly of Mr. Fayerweather; is it not so?

Mr. Bovee: We object to it as incompetent and calling for the conclusion and opinion of the witness and not the facts, and as irrelevant and immaterial.

F. 744 (At the request of the witness, Question No. 304 was repeated by stenographer.)

A. It does not.

305 Q. Mention any paper made by Mr. Fayerweather or attributed by anybody to him which mentions the Woman's Hospital?

A. I have not said that there was any paper by Mr. Fayerweather which mentions the Woman's Hospital. You have asked me whether the deed of gift related to—you have asked me whether it was I who, with the executors prescribed the beneficiaries under the deed of gift. Messrs. Bulkley, Ritch and Vaughan specified the bene-

ficiaries, in some cases speaking to me upon the subject, and with reference to some not; and about some of them I had conversation with the executors, with Messrs. Bulkley, Ritch and Vaughan, one or all; I had conversation with them about the Woman's Hospital; I was the president of the Woman's Hospital at the time.

Mr. Sherman: I move to strike the answer out as not responsive and I repeat the question.

Mr. Bovee: We object to striking out the answer and we object to repeating the question.

F. 745

(At the request of Mr. Sherman, Question No. 305 repeated by stenographer.)

Mr. Bovee: We object to that question as irrelevant, immaterial and incompetent.

A I have answered fully. I can make no other answer.

306 Q. The will gives the Woman's Hospital $10,000, does it not?

Mr. Bovee: We object as incompetent, the will is the best evidence of what it contains.

A. It leaves the Woman's Hospital a legacy, the amount I do not happen to remember at the pres-

F. 746 ent time.

307 Q. And you being president of the Woman's Hospital, as well as having an opportunity by this situasituation, attempted to give the Woman's Hospital a million dollars, did you not?

Mr. Bovee: We object as incompetent.

A. No.

308 Q. How much did you attempt to give the Woman's Hospital by the deed of gift?

A. I did not attempt to give the Woman's Hospital anything by the gift or in any other way. I spoke to Mr. Vaughan certainly and probably to Mr. Bulkley and Mr. Ritch about the Woman's Hospital,

about its work, about the prominent ladies and gentlemen who were concerned with it, and the merit of the institution, the possibility that a memorial gift to that institution would meet certain wishes that were communicated to me as entertained by Mrs. Fayerweather, and the outcome was the deed of gift.

309 Q. Do you mean to say that Mrs. Fayerweather had anything to do with specifying or any choice respecting the institutions in the deed of gift?

A. I do.

F. 747 309 Q. What institutions did she have anything to do with?

A. All. I wrote to Mr. Coudert a letter upon the subject enclosing to him a copy of the deed of gift, or sent him the deed of gift before it was executed.

310 Q. When you say that she had all to do with the deed of gift you mean that she could by no means obtain any part of what her husband gave her by his will until she should assent to your choice of the beneficiaries in your deed of gift, otherwise in what respect did she have all to do with the selection of donees, of institutions mentioned as donees in the deed of gift.

A. I have not said that she had all to do with the selection of beneficiaries under the deed of gift. I

F. 748 have said that she had to do with the selection of all of them, and if the stenographer has taken my testimony differently, he has taken it incorrectly. There is a marked difference.

311 Q. What is the difference? If there be that difference answer the question with that change?

A. The difference is that Mrs. Fayerweather did not have all to do with the deed of gift. Messrs. Bulkley, Ritch and Vaughan had to do with it, I had to do with it, Mr. Haley Fiske had to do with it, Judge Stoddard had to do with it, Mr. Seth Low had to do with it, Mr. Stephen P. Nash had to do with it, Mr. Joseph H. Choate had to do with it—

312 Q. Why not Grover Cleveland? Do you consider that a responsive answer to my question?

A. I have not finished my answer and I wish the stenographer to note that my answer is broken in upon by counsel say "What about Grover Cleveland" or something of the kind, what is the matter with Grover Cleveland. Now I will proceed with my answer.

Mr. Sherman: Counsel for complainants objects to the version given by the witness of the progress of the record, insisting that there are long pauses and
F. 749 delays due to the witness apparently being engaged in reflection and at all events apparently having finished his answers in which pauses counsel for complainants has endeavored to formulate new questions, succeeding only so far as to start the witness again upon a new answer.

The Witness: There are no pauses. Mr. Sherman has the power and he exercises the power of interrupting an answer and in that way breaking it up. I propose now, after his interruption, to go on and complete my answer, or he can withdraw the question just as he sees fit.

(At the request of the witness, testimony read by the stenographer.)

F. 750

The Witness: I want to finish my answer to the question which has been put. When the deed of gift was in complete draft with the institutions and beneficiaries first mentioned and with a reservation under which Messrs. Bulkley, Ritch and Vaughan could make further provisions therein stated, it was submitted to Mr. Coudert on behalf of Mrs. Fayerweather with a letter dated February 14, 1891, which appears at pages 430 and 431 of the printed record of the Truax trial, and that letter followed by a few days a conversation which I had had with Mr. Coudert; and that in my letter I told Mr. Coudert that if Mrs. Fayerweather had wishes in this regard, that is to

say, the disposition of the residuary estate, or if she knew of objects which she thought Mr. Fayerweather would have favored they would be glad to be informed of it. And I further informed Mr. Coudert that what Mr. Fayerweather's wishes were, referring to Mrs. Fayerweather, Mr. Coudert knew by his own handwriting, referring to the memorandum about which I have testified heretofore this morning; and further telling Mr. Coudert that if the $15,000 a year given by the will was inadequate,

Messrs. Bulkley, Ritch and Vaughan were satis-
F. 751 fied that it would not be against Mr. Fayerweather's wishes that it should be increased and that it was their wish to increase it to any adequate amount. This letter was offered upon the Truax trial and was objected to as evidence by Mr. Reynolds, then counsel Colonel James. Following that or nearly contemporaneous with that letter was the reading of the deed of gift in open Court before the Surrogate. So that Mrs. Fayerweather's counsel was fully informed what Messrs. Bulkley, Ritch and Vaughan proposed to do in every detail.

Mr. Sherman: I move to strike the answer out as not responsive.

313 Q. You speak of a memorandum which you have mentioned here this morning. What memoran-
F. 752 dum do you refer to?

A. One memorandum, according to the record on the Truax trial of the Five Colleges' complaint was dated March 22nd, 1889, and said "I also wish that one thousand dollars be given Miss Joyce," Miss Joyce is the lady who is now Mrs. Reynolds, "immediately after my decease in addition to the provision made in my will."

Mr. Sherman: I want the stenographer to note that the witness makes some expenditure of time looking through some book to which I object.

The Witness: The witness is looking through the record of the Truax trial to find the memorandum about which the counsel has asked. If the counsel does not

wish to know about the memorandum, the witnees has no wishes upon the subject and he closes the book.

Mr. Sherman: The counsel for the complainants has not requested the witness to refer to the book, but the witness having introduced himself a statement that there was a memorandum to which he had referred this morning and having previously stated that the dispositions made by this witness in drawing the deed of gift rested upon some writing attributed to Mr. Fayerweather and which he stated to be I think in Mr. Vaughan's
F. 753 handwriting, I ask him to state without reference to any book what that writing was, and I object at present to his use of any book for the purpose of his answering the question.

(At the request of the witness, Question No. 313 was repeated by stenographer.)

The Witness: The other memorandum I can refer to. What I have in mind is in the record. It is to the effect that Mr. Fayerweather deemed provision which he had made for certain persons, I think Miss Joyce now Mrs. Reynoids is one, I think that Mrs. Fayerweather is one, was sufficient, and we assumed that nothing else
F. 754 was to go to them.

314 Q. Where is that memorandum, Mr. Parsons?

A. I cannot tell without being permitted to examine the record.

315 Q. Do you say that there is any such memorandum as that in either the Surrogate's record or the Five College record?

A. I will answer that question when I have examined the Five Colleges' record and the Surrogate's record.

316 Q. You cannot answer the question until you have, can you?

A. I cannot keep in mind several thousands of pages

of testimony and exhibits, but I can very easily refer to the memorandum which I have in mind if permitted.

317 Q. Did you not state a while ago when I asked you for writings which came to your attention which justified your insertion of certain institutions in the deed of gift, a writing in Mr. Vaughan's hand and which you said you had before you at that time?

A. No.

318 Q. Have you not testified to that in substance?

A. No, not intentionally; I do not think I have
F. 755 at all.

319 Q. From whom did you receive any memorandum which you have spoken of as justifying your selection of institutions for the deed of gift?

A. I have not testified to any memorandum as justifying my selection of institutions for the deed of gift.

320 Q. Well, the selection by the executors of institutions if you prefer that?

A. I have not referred to any memorandum as justifying any selection of institutions by the executors; I have referred to a memorandum which showed what Mr. Fayerweather's wishes were or bore upon the subject.

321 Q. I have several times asked you for memoranda, whether there were any memoranda known to you
F. 756 which justified the selection of institutions in the deed of gift, and you state that there were such, but those that you point out appear by your own statement only to relate to the limit desired by Mr. Fayerweather to be placed upon gifts to his wife and to Miss Joyce. Are those the only memoranda known to you which you consider justified the selection of institutions for insertion in the deed of gift, and which institutions were not specified by name in either the will or codicils or the memoranda introduced in evidence in the Five College action upon which the decision was reached respecting the secret trust?

A. I decline to accept counsel's statement of what he says he has several times asked me.

322 Q. I do not ask you to accept statements; I propound to you questions. Do you deny that I have asked you such questions this morning and that they appear upon this record?

Mr. Bovee: We object to it as incompetent, irrelevant and immaterial.

A. I think that the record will show that there has not occurred what the counsel states in his ques-

F. 757 tion to have occurred.

323 Q. Well you say you think so. Do you mean to assert that as part of your sworn testimony to be the fact?

A. I have several times said that everything which I state is under oath, that it all constitutes part of my sworn testimony, and I resent — or I would if asked by anybody else — I would resent questions of that character.

324 Q. When you prepared the deed of gift and arranged for the releases to be given by the widow and next of kin, you counted, did you not, upon having no one to deal with but women?

Mr. Bovee: We object to the question as incompetent, as assuming facts which have not been proven,

F. 758 and as irrelevant and immaterial.

(At the request of the witness, Question No. 324 was repeated by stenographer.)

A. Just exactly the reverse.

325 Q. Well, excepting Mr. Coudert and Mr. Rollins acting as attorneys or as counsel, upon your suggestion that they should have $50,000 for fees if the settlement should go through otherwise the statement I have embodied in the previous question is accurate, is it not?

Mr. Bovee: Same objection.

A. Both the statement in the previous question and

in the last question are absolutely untrue and without any foundation in fact.

326 Q. You have spent nearly a day, have you not, in examining John B. Reynolds as to the manner in which he became acquainted with his present wife, who was Miss Joyce, and as to his acquaintance with Mrs. Fayerweather, and reflecting upon the disposition of such money as went to Mrs. Fayerweather under the settlement, in the effort to show that you resented the appear-
ance of a man upon this stage, not a paid attorney,
F. 759 to vindicate or assert the rights of Miss Joyce,
now Mrs. Reynolds and of Mrs. Fayerweather and the nieces?

Mr. Bovee: We object to the question as incompetent, the record of the examination of Mr. Reynolds is the best evidence of what was done.

A. Nothing of the kind. When I negotiated with Mr. Coudert I negotiated with a gentlemen in whom I had every confidence and whose character is above reproach. My examination of Mr. Reynolds was among other things to show that his statement that Mrs. Fayerweather had made some prayer or had put something in a complaint was untrue, and furthermore to show that subsequent
to Mrs. Fayerweather's death this litigation in all
F. 760 its inconsistent forms had proceeded, the outcome
being the benefit, if it could be accomplished, of Mrs. Reynolds and Mr. Reynolds, and not even of the nieces, Miss Emma S. Fayerweather and Mrs. Achter.

327 Q. You seize upon a mere verbal discrepancy, to wit: your contention that there was no complaint actually served during Mrs. Fayerweather's life, notwithstanding that there was a very informing and comprehensive complaint served as soon as her will was probated and Mr. Reynolds as her executor was in position to do so, to put the responsibility for the suit and to attribute the disagreement from that settlement upon Mr. Reynolds;

was not that the purpose among others of your inquiry of him?

A. Not at all. Mr. Reynolds was asked questions which led him, I think they were so asked as intentionally to mislead him into the statement that Mrs. Fayerweather had made some prayer and that there was a complaint on the part of Mrs. Fayerweather and that it was subsequently amended, when I knew the fact and Mr. Reynolds knew the fact and Mr. Sherman ought to have known the fact that there was no such complaint
F. 761 by Mrs. Fayerweather, that the only complaint was a complaint by Mr. Reynolds, and that any prayer and that the only prayer of which I know or ever heard was in a complaint by Mr. Reynolds. And so far as concerns the assumption that I seize upon verbal discrepancy there is not the slightest foundation for it; I seize upon nothing, but I take such caution as I can against acquiescing in assumptions in questions which do not correspond with the truth.

328 Q. Will you state positively that the Woman's Hospital of the State of New York is the only beneficiary under the deed of gift whose insertion in the deed of gift was the result of your direct activity?

Mr. Bovee: We object to it as irrelevant and
F. 762 immaterial.

A. I suppose that the word "activity" is a term which comes within the counsel's description of a discrepancy. I will not state that the insertions of any beneficiary was the result of direct activity on my part, but I am perfectly willing to tell counsel, if desired, everything that occurred with which I had anything to do and of which I knew about the deed of gift, and my relation to any of the institutions which are mentioned in the deed of gift.

329 Q. Mr. Parsons what amount of fees have you received since November 15, 1890, from Henry B. Vaughan, Justus L. Bulkley and Thomas G. Ritch, or the executors

of Daniel B. Fayerweather, or from any colleges for whom you have appeared or your firm has appeared, and which you would not have received so far as you can be certain if you had not succeeded in the probate — in effecting the probate of the will and codicils which were probated, and if you had not succeeded in obtaining the releases from Mrs. Fayerweather and the nieces.

Mr. Bovee: Counsel for defendants objects upon the ground that the matter is entirely irrelevant and immaterial to any possible issue in this case.

F. 763 A. I have no present recollection about the fees which I have received. I can, if counsel will state that it is relevant and material, ascertain and furnish a statement in detail of everything which has been received by me. Nothing has been received by me upon any such hypothesis as the question assumes.

Mr. Sherman: Counsel for complainants states that he considers it material as showing the motive and intent of the witness in and about the transactions of which the complainants herein complain to show the extent and amount of the inducement under which the witness has acted herein.

Mr. Bovee: Defendants object upon the ground that it is none of complainants' business what has been paid

F. 764 to Mr. John E. Parsons or anybody else as in the judgment of Amherst against Ritch it was judicially determined that neither the plaintiff John B. Reynolds in the cross bill, nor the plaintiffs Achter and Fayerweather had any interest in this residuary estate whatever, and that judgment has been unanimously affirmed by the Court of Appeals.

Mr. Parsons: Don't say unanimously.

Mr. Bovee: Yes, unanimously with the exception of one. This not an accounting but a speculative fishing expedition on which it is hoped to find something upon which to predicate new suits and new litigation.

Mr. Parsons: It is not even that.

330 Q. Is the question to be answered?

A. I have no other answer to make.

Mr. Sherman: What is the answer?

(Answer repeated by stenographer.)

331 Q. I repeat the question.

A. I repeat the answer.

332 Q. Is that the only answer you will now make?

A. It is the only answer which I can now make.

F. 765 333 Q. In what testamentary paper did Mr. Fayerweather mention that the Woman's Hospital of the State of New York was about to put up a new building?

A. No testamentary paper of which I know or ever heard or anybody else so far as I can conceive. Mr. Fayerweather's testamentary papers gave his residuary estate to Messrs. Bulkley, Ritch and Vaughan. That has been stated here over and over and over again — and good many more overs.

334 Q. Did you not state in answer to Question No. 179 among other things as follows: "I was the president of that hospital at the time and I remember referring to the fact that it was mentioned in one of Mr. Fayer-

F. 766 weather's testamentary papers that it was purposing to put up a new hospital building and that it might be agreeable to the executors and probably to Mrs. Fayerweather if a memorial building for that hospital should be erected"?

A. I made the statement, but the counsel reads the statement continuously as if I had said that it was in a testamentary paper of Mr. Fayerweather. I said it as an independent fact, that it was about to put up a new hospital building.

335 Q. Then it was not true that it was mentioned in one of Mr. Fayerweather's testamentary papers that that

institution was purposing to put up a new hospital building?

A. The question implies that I made a statement to that effect. It is not true that I have made any such statement. I stated what was the fact, that the Woman's Hospital were about to put up a new hospital building.

336 Q. And you do not intend to be understood that it was mentioned in one of Mr. Fayerweather's testamentary papers that it was purposing to put up a new hospital building?

F. 767 A. I did not.

337 Q. You did say so, didn't you?

A. I did not. I said as an independent fact that it was about to do so and that its name was mentioned in some testamentary paper of Mr. Fayerweather referring to the legacy about which you asked me to-day.

338 Q. You say so now, but in answer to Question 197 you said "I was the president of that hospital at the time and I remember referring to the fact that it was mentioned in one of Mr. Fayerweather's testamentary papers that it was purposing to put up a new hospital building." Did you not so testify then whatever you testify now?

A. I testified then as I testify now that I referred to the fact that it was purposing to put up a build-

F. 768 ing.

339 Q. Mr. Parsons do you still adhere to your contention that Exhibit OA and this conversation to which it related as testified to by Mr. Vaughan in the Five College action was not a material and important piece of information for the contestants to have to make a full, fair and complete presentation of such objections as there were to the probate of the codicil of Mr. Fayerweather dated on November 15th, 1890?

Mr. Bovee: We object to the question as incompetent, irrelevant and immaterial.

(At the request of the witness, Question No. 339 was repeated by stenographer.)

A. For my testimony about contention I refer to the testimony itself. My testimony was not expressed in such language as the counsel uses and I decline to be responsible for his language. I am perfectly willing to tell what my contention was if desired.

340 Q. You understood, did you not, that Mr. Coudert had received from you the impression and assurances in substance that you had submitted to him all evidence which had a bearing upon the question of will or no will, and that he acted upon that assurance so far as

F. 769 he was concerned?

Mr. Bovee: We object to the question as incompetent in that it assumes facts which have not been proven, and calls for the opinion and conclusion of the witness, calls for matter which is irrelevant and immaterial to the matter presented by the special plea.

(At the request of the witness, Question No. 340 was repeated by stenographer.)

A. I understood nothing differently to that which I have previously stated. I can add nothing to what occurred between Mr. Coudert and myself with reference to papers.

F. 770 341 Q. Can you give a negative reply to the question I have just asked?

A. Can I give what sort of reply?

342 Q. Negative reply.

Mr. Bovee: We object to the question as incompetent.

A. I can say that I do not remember that I had any understanding on the subject one way or the other, if that is what the counsel desires to know.

343 Q. Have you any reason to suppose to the contrary of the statement embodied in the question?

Mr. Bovee: Same objection, and as incompetent, irrelevant and immaterial.

A. I have no recollection beyond that which I have

stated. I have recollection that the papers which came in evidence before the Surrogate were all the papers which bore upon the issue of the will or no will, and that many of them did not bear upon that issue, but that they were elicited with a view to the future contest which Mr. Coudert manifested a purpose to institute and that they came in evidence before Judge Truax and that it was upon them that their decision was based.

344 Q. When you say that it was manifest that Mr. Coudert then proposed to institute some other
F. 771 proceeding, do you mean that such disposition had been made of the efforts to try the question of secret trust before the Surrogate as naturally would lead to a suit to determine that question?

(At the request of the witness, Question No. 344 was repeated by stenographer.)

Mr. Bovee: We object as incompetent, irrelevant and immaterial and as calling for the opinion and conclusion of the witness and not a fact.

A. I have tried my best to put some significance to what the question asks about a disposition to try an effort, if that is the phraseology, or the rest of
F. 772 what follows in the question; and with the best disposition to understand it, I can't do it.

(At the request of Mr. Sherman, Question No. 344 was repeated by stenographer.)

The Witness: I do not know what is meant by naturally leading to something and I do not know what is meant by the disposition of an effort. If the question is made intelligible I will endeavor to answer it; I cannot answer that question; I can state what occurred.

Mr. Sherman: I move to strike out the answer as not responsive, as obviously incorrect.

345 Q. You have said in one of your preceding answers that it was manifest that Mr. Coudert intended to bring some other action. How was that made manifest during the probate trial?

A. I am not sure that the expression that I used was had an intention, it may be I said had in contemplation. The way in which it was made manifest was this: Mr. Coudert put in evidence testimony which bore upon the question of trust or no trust; Mr. Coudert was an excellent lawyer and knew that there was not any
F. 773 issue before the Surrogate of trust or no trust, that the issue before the Surrogate was probate or no probate; and Mr. Coudert, as the lawyer that he was, knew that if there was to be made a claim of secret trust the appropriate tribunal was the Supreme Court to which resort ultimately was had; and Mr. Coudert before the Surrogate was met by the argument or by this statement while the trial proceeded, that all testimony irrelevant to the issue of probate or no probate and irrelevant to the issue of trust or no trust was incompetent as before the Surrogate. Furthermore the Surrogate was an admirable probate lawyer and I inferred from his course that he took the distinction which was in my mind and while I believed to have been in the mind of Mr. Coudert
F. 774 and if I am correctly informed, the Surrogate spoke to Judge Rollins upon the subject. I allude to information which has come to me very recently.

346 Q. Was the question of will or no will tried in the Five College action.

A. Not that I remember; I think that the Five Colleges' suit went upon the idea, both by the complaint and by Mr. Reynold's answer, that the papers admitted to probate did constitute Mr. Fayerweather's will, the reverse of what I gather to be his present position.

347 Q. Well, do you mean to be understood that it was open to him in the Five College action in the Supreme Court to have taken any other ground, in other words

that he could have introduced there an issue of will or no will?

A. Precisely. I mean to say this, that if at that time Mr. Reynolds in good faith believed that the probate could be contested, it was a violation of good faith on his part to inform the Supreme Court and to ask relief predicated upon the assumption that the papers admitted to probate did constitute Mr. Fayerweather's will. He was under no obligation to take such a position, such a position was inconsistent with his present contention that the papers did not represent Mr. Fayerweather's will, and Mr. Reynolds was to know that that was a suit which involved the disposition of Mr. Fayerweather's residuary estate and that by judgment in that suit his claim or the claim which he represented would be disposed of, and if therefore he had any claim which was entitled to recognition by the Court in support of his assertion that he represented an interest in the estate, it was — one would think he as executor would put it before the Court — and one would think that it was the duty of his counsel to put it before the Court; Colonel James, a most competent lawyer, the then lawyer of Mr. Reynolds, took the position the reverse of that which is taken by the present counsel of Mr. Reynolds, if I can infer what is the position of the present counsel from pleadings and questions and declarations and other procedure on his part.

F. 775

F. 776

Mr. Sherman: I move to strike the answer out as not responsive and as a gross abuse of the duty of the witness whereby John E. Parsons as counsel spreads upon the record an argument which has no relation whatever to the question.

The Witness: I would like to see whether that question did not ask whether Mr. Reynolds could have done certain things.

(Question No. 347 repeated by stenographer.)

The Witness: Precisely.

348 Q. If Mr. Reynolds had been under any obligation or necessity to take the course pointed out in the argument in answer to the last question, could he have assailed the probate in the Supreme Court and in the Five College action as projected, or would he have been under the necessity in the distribution of remedies in the State Courts to have made his application in the Surrogate's Court to assail the will? I would like to have a responsive answer to this question if it be possible.

F. 777 A. I have not said that Mr. Reynolds was under any obligation or necessity to do anything. I have not made any argument in answer to the last question and I cannot say yes or no to a question which contains untrue hypothesis. I can state what, if Mr. Reynolds believes what he professes now to believe, he in my judgment as a lawyer could have done and should have done.

349 Q. You do not yet tell us where you think he should have applied, whether to the Supreme Court in the Five College action or to the Surrogate's Court. So far the question is unanswered. Please answer it.

Mr. Bovee: Defendants' counsel objects to the question as incompetent, in that it is hypothetical and

F. 778 calls for the opinions and conclusions of the witness. The opinions of the witness the defendants are very glad to avail themselves of, but not when sought by counsel for the complainants and also as incompetent, irrelevant and immaterial.

(At the request of the witness, Question No. 349 was repeated by stenographer.)

A. Under certain circumstances I think that he could have applied to the Supreme Court; under certain circumstances I think he could have applied to the Surrogate's Court, but he could not apply in either Court,

or in any other Court in Christendom of which I know, to have undone a probate when he swore in his complaint that the papers proved as Mr. Fayerweather's will and codicils were Mr. Fayerweather's will and codicils and asked relief upon that basis, the relief sought being to have it declared that the provisions were invalid as in violation of the Act of 1860, and that thereby he, Mr. Reynolds, in the interest of the legatees under Mrs. Fayerweather's will was entitled to relief. He could not at the time stand upon two inconsistent legs. I do
F. 779 not think he can do it at any time.

Mr. Sherman: I move to strike out the answer commencing "what he could not" as not responsive.

350 Q. Under the circumstances set forth in the cross bill of complaint herein, assuming them to be true for the sake of the question, could he have successfully applied for any relief based thereupon by way of annulment of the codicil of November 15th, 1890, as a defendant in the Five College action?

Mr. Bovee: Defendants object upon the ground that the question is incompetent and in that it calls for the opinion of the witness and as incompetent, irrelevant and immaterial to the issue presented by the special plea.

Whatever obligations the Fayerweather estate
F. 780 may have to pay the witness for professional services, there is no obligation on the part of the witness to tender advice or counsel to complainants in this proceeding.

A. I decline to recognize that under the guise or pretense of questions there is a right to ask or any obligation on my part to express opinions as a lawyer, and furthermore I decline to express such an opinion, if I were willing to express it at all, upon an assumption which I believe to be the reverse of the truth.

351 Q. Having volunteered without any request from counsel for complainants and entirely unsolicited and against the desire of the counsel for the complainants a

protracted argument respecting your views of the law in answer to a question which called for nothing of the kind, do you now decline to submit to any further analysis of that unsolicited opinion?

A. The assumption of the preceding question is like a great many other assumptions of the same gentleman, and I decline to acquiesce in them. If he has any further question to put to me, when I know what it is I will tell whether I am willing to answer or not.

351 Q. Do you decline to answer the last preced-
F. 781 ing question otherwise than you have answered it?

Mr. Bovee: The defendants object to any further interrogation of the witness.

A. If counsel really wishes to know my opinion as a lawyer about the course pursued by Mr. Reynolds through this litigation, about the inconsistent positions taken by him, in one case under the advice of one counsel and latterly under the advice of another counsel I am willing to do so, but I am not willing to express an opinion on these subjects and then have it said that it is not asked and that it is volunteered. I have volunteered nothing.

Mr. Sherman: I move to strike the answer out
F. 782 as not responsive.

353 Q. Will you now state whether in the action brought by the Five Colleges, which appears to have been an action addressed to the jurisdiction of the Supreme Court of the State of New York over trusts, and which appears to contain a prayer to the Supreme Court to construe an alleged trust arising out of the title conferred by the residuary clause or engrafted upon that title by intrinsic facts, it was competent under the distribution of remedies in the Courts of the State of New York for the complainants in this suit there coming in as defendants to obtain upon any allegations or any proof a judgment

declaring the will and codicils to be invalid or in any respect assailing the probate thereof.

Mr. Bovee: Defendants object to the question as incompetent, it being hypothetical and containing conclusions of counsel as to the meaning of the bill of complaint in Amherst against Ritch. They further object to the matter sought to be elicited as irrelevant and immaterial to the issues raised by the special plea, and as calling for the opinion of the witness.

A. If by competent is meant could Mr. Reynolds
F. 783 take such a position, I am compelled to admit that I think he could take any position that he saw fit. If by competent is meant do I think that he could succeed in any such inconsistent positions, one telling the Court that there was no will and the other that there was and asking relief, I do not think that it was competent for him to do so. Courts of justice exact on the part of suitors, particularly in a matter which concerns a trust, fair dealing and consistency, and I do not think that it is right for a suitor to violate those rules.

Mr. Sherman: I move to strike the answer out as not responsive and I protest against the argument introduced under the pretense of an answer under oath.

F. 784 354 Q. Can you answer the last question in any otherwise than you have answered it, and especially can you answer it without any gratuitous flings at Mr. Reynolds and treating the question as one involving no assumptions of fact in a particular case, but relating to the distribution of remedies in the State Courts? If so please do so.

A. I decline to answer this question. I have made no gratuitous fling at Mr. Reynolds; his own counsel put Mr. Reynolds in the situation in the Five Colleges' suit of claiming relief under the will and against the will and asked me whether it was competent for him to do it.

Mr. Sherman: I move to strike out so much of the answer as begins "his own counsel" as not responsive.

355 Q. Mr. Parsons, did you hear Mr. Ritch testify in the Surrogate's record when he was asked if that was all the papers, referring to those which have been produced, "A. Yes, all the papers in writing having any connection with the will except two or three very immaterial pieces of lead pencil writing which do not affect in any way at all. Q. In whose handwriting are they? A. Mine"?

F. 785 Mr. Bovee: Defendants object to it as incompetent, in that the record of the Surrogate's Court is the best evidence of what was testified to there, and that after a lapse of ten years it is impossible for any man to recall just what was testified to by the witness, and irrelevant and immaterial to the issues presented by the special plea.

Mr. Sherman: Counsel for the complainants protests that under pretense of making objections the counsel for the defendants is instructing the witness.

Mr. Bovee: Counsel does not presume to instruct the witness who is now in the chair in this case, and counsel for the defendants will take his objections at all times and on all occasions that he deems proper.

F. 786 A. I cannot remember, I might be able to testify if I were permitted to refer to the record, but the examining counsel has refused to permit me to have such reference.

(Counsel for complainants points out to the witness what purports to be a report of the matter quoted in the printed Surrogate's record at folio 2610, page 870.)

356 Q. If your memory is aided by this record to which your attention is now called, please answer the question?

A. My memory as an act of independent memory is not aided. I see that according to this printed record

such a question was put to Mr. Ritch, and that according to this printed record he purports to have made such an answer as is embodied in the question.

357 Q. When that testimony was given did you call the attention of the counsel for the contestants to the fact that that statement was erroneous in so far as it did not embrace or refer to the paper which was afterwards marked Exhibit OA?

Mr. Bovee: Defendants object on the ground that it is irrelevant and immaterial to the issue which is
F. 787 presented upon the special pleas.

A. As far as I can at the present time examine this record, the questions and the papers in writing that had connection with this will referred to the will as distinguished from the codicils. The assumption of the question which is that the testimony was erroneous is not true. The testimony so far as I know was absolutely correct. Upon the subject I know nothing of direct knowledge or of information excepting as Mr. Ritch's testimony indicates.

358 Q. Is that true in view of the testimony given by Mr. Vaughan on the Five College action trial concerning the conversation with Mr. Fayerweather during which he made the lead pencil memorandum which he made
F. 788 upon Exhibit OA?

A. It is true so far as I know; and knowing Mr. Ritch as well as I do I believe that it is absolutely true.

Mr. Sherman: I move to strike out that part of the answer which begins "and knowing Mr. Ritch" as not responsive.

359 Q. You have undertaken to say that Mr. Reynolds was concluded or estopped from pursuing a claim which he makes in this suit because he came in as a defendant in the Five College action and by way of answer set up an ineffectual prayer for the relief based upon the assumption that the will and codicils as admitted to probate were

the valid testammentary papers of Mr. Fayerweather, have you not?

A. I have not undertaken to say anything; I have answered as directly as is possible questions which have been put to me. If I understood the involved and complicated questions which were previously addressed to me, they did not proceed upon the hypothesis of what Mr. Reynolds did in this suit but upon the hypothesis of what he could do in the Five Colleges' suit in view of the answer which he interposed there.

F. 789 360 Q. Have you not undertaken to state here in your deposition by way of commentary or stricture upon Mr. Reynolds that he had in this suit taken a position in reference to the will which was entirely inconsistent with that taken by him in the Five College action and which by every rule of law known to you he was thereby precluded from taking, or that in substance?

Mr. Bovee: Defendants object upon the ground that the record is the best evidence of what the witness has stated. The question calls for no fact and is irrelevant and immaterial.

(At the request of the witness, Question No. 360 was repeated by stenographer.)

F. 790

A. I have not undertaken to say anything; I have answered certain questions which were put to me and my answers will show. Let them speak for themselves. My recollection of what the counsel asked me is whether it was available for Mr. Reynolds to stand upon the claim which he makes in this suit in the Five Colleges' suit consistently with the position which he took there, and if I have not expressed the opinion I am willing to express the opinion that I do not think he could do so. It does not seem to me that that constitutes a stricture by me upon Mr. Reynolds, it seems to me that the proposition is his condemnation.

361 Q. You withdraw then any such stricture which you have made in your testimony, do you?

Mr. Bovee: We object to the question as incompetent.

A. I do not withdraw anything.

362 Q. Do you testify that if a material circumstance previously concealed by you from the counsel of Mrs. Fayerweather, concealed by you with the intention to have a settlement which you were proposing accomplished in ignorance of a material fact, a fact so material as put together with the other circumstances of the pro-

F. 791 bate contest affecting the integrity of the dying day codicil as probably to result in a decree setting aside that probate for fraud, should transpire in the Five College action after the pleadings had been made up and during the trial that that discovery of a material fact of that character would not justify an action like this, or that any estoppel could be built up upon that successful fraud to defeat an action brought to set aside and replace the party imposed upon by it in the original situation?

Mr. Bovee: Defendants object to the question as incompetent and hypothetical and containing false assumptions and calling for the opinions of the witness, and as irrelevant and immaterial to the issues presented upon the special plea.

F. 792 Mr. Sherman: I wish to have that question read.

The Witness: It is not necessary.

Mr. Sherman: I want it read.

(Question 362 repeated by stenographer.)

A. The assumption or hypothesis of the question is absolutely untrue and I decline to express an opinion upon an assumption which is absolutely untrue. The assumption is not only untrue as a whole, but it is untrue in detail, and the counsel who puts the question has

been informed during the progress of this examination that it is untrue. Furthermore I—

363 Q. Informed by whom?

A. He has been informed by the answers which I have given to his own questions, I being examined as his witness, what is the truth of the situation, and his assumption has been the reverse of that; he either has been informed or ought to be informed that the assumption is untrue by the testimony of Mr. Reynolds to the effect that after he was informed about what occurred

F. 793 on the probate trial by a perusal of the record and after he knew that Mr. Vaughan had testified about the interview of November 15th, 1890, he went to the representatives of the Colleges and gave them information with a view of the commencement of the Five Colleges' suit which proceeded upon the assumption that the papers admitted to probate constituted Mr. Fayerweather's will; and furthermore in the fact that Mr. Reynolds has testified here that he himself brought a suit upon the same assumption that these papers constituted Mr. Fayerweather's will and that that was done at a time when there was accessible to him what occurred on the probate trial. All of that is evidence directly the reverse from the assumption.

F. 794 364 Q. Where have you testified that Mr. Vaughan swore in the probate contest that the conversation with Mr. Fayerweather in which instrtuctions were given for his codicil, and which instructions were embodied in the endorsements upon the Exhibit OA, occurred on the morning of November 15th, 1890, and before the execution of the codicil?

A. I have testified to my recollections of what Mr. Vaughan testified to over and over and over again.

Mr. Sherman: I move to strike the answer out as not responsive.

The Witness: I have testified —

Mr. Sherman: And I object to its further progress on

the ground that is is obvious that the witness is not designing to answer the question responsively.

The Witness: I have testified over and over and over again that I have no recollection about the period of the day which Mr. Vaughan assigned for that conversation, and I have in response to some matters asked to be permitted to refer to the record, and that permission has been refused. Exactly what I may have testified to with respect to this detail or that the record of my present examination will show. It is to that that I refer.

F. 795 Mr. Sherman: I move to strike the answer out as not respousive, except the last sentence.

365 Q. It appearing in the Surrogate's contest that evidence having been therein given tending to establish that Mr. Vaughan about November 10, 1890, induced Mr. Fayerweather to obtain from Mr. Ritch Mr. Fayerweather's will and codicils, in order to learn what testamentary dispositions he had made, and learned that these papers as they then read gave the residuary estate to Bulkley and Ritch and made Vaughan only an executor and not a residuary legatee; and that Vaughan then learned that a discretion was attached to the legacy to Mrs. Fayerweather, to the legacy to the ninth clause institutions, and that the legacy to Miss Joyce oper-

F. 796 ated only until she married, and that Ritch and Bulkley by the exercise of discretion could throw the greater part of the fortune into the residuary estate and then take it absolutely; that all the memoranda which could qualify this apparent condition were in Mr. Ritch's possession, where also the will and codicils had been since the execution thereof; it appearing also in the Surrogate's contest that Vaughan upon learning this condition of things persuaded Mr. Fayerweather that Ritch had brought this about in order to enrich himself by an abuse of this opportunity, that he Mr. Fayerweather could not further trust or deal with Ritch, that the course open to defeat this scheme was to have Mr. Butler

draw a codicil for Mr. Fayerweather to execute restoring the tenth clause of the will and to satisfy the relatives to such an extent as should be sufficient to induce them to permit the tenth clause to be carried out rather than adhere to Mr. Ritch's plan to defeat the statute and the relatives by a secret trust; that Vaughan procured Mr. Butler to draw such a codicil which was executed by Mr. Fayerweather on November 11, 1890; that thereafter Mr. Fayerweather rejected overtures from Ritch and never saw him again; that Vaughan took pains to pre-
F. 797 vent Ritch from seeing Mr. Fayerweather again and withheld from Mr. Fayerweather Mr. Ritch's letter stating the intention in making the residuary clause in the mode in which it was, which letter so withheld was written November 14th, the day before Mr. Fayerweather died; that Vaughan wrote Miss Joyce for Mr. Fayerweather's information on November 13th, the Thursday before Mr. Fayerweather died and after the execution of the Butler codicil a letter stating that upon his, Vaughan's, demanding Mr. Fayerweather's will of Ritch he, Ritch, grew as white as the paper on which Mr. Vaughan was then writing, and in which letter Mr. Vaughan added that he would deliver a second letter to Mr. Ritch the next day but that there would be little use of de-
F. 798 livering the letter, which was a letter seeking a declaration of trust from Ritch, Mr. Vaughan in his letter assigning as the reason for so thinking that Mr. Ritch's manner convinced him, Mr. Vaughan, that Ritch knew just what he was doing; it further appearing in the Surrogate's contest that some plan entailing more time for execution which Vaughan entertained respecting Mr. Fayerweather's testamentary papers looking to another codicil was thwarted or disconcerted by the information given him on the morning of November 15, 1890, by Mr. Fayerweather's doctor that Mr. Fayerweather was about to die and that any paper which should be signed, must be signed that day; that thereupon Vaughan went

in haste to the office of Arnoux, Ritch and Woodford and brought thence two clerks with the codicil of November 15, 1890, to which Mr. Fayerweather's name was appended that afternoon, and which was the codicil under attack in that contest; that no disclosure was made to Arnoux, Ritch and Woodford of the existence of the codicil of November 11th; that the services of Mr. Butler, who had drawn the codicil four days before, were not called for, that no explanation of going back to Ritch's firm under the circumstances appeared except the inferential
F. 799 explanation that it would have been impossible to pass a codicil through the sick room that should reinstate the objectionable features of the residuary clause to cancel which, Mr. Butler's codicil had been drawn, especially where it merely added Vaughan to the roll of residuary legatees, without explanations requiring to be made which Mr. Fayerweather was not in a condition to consider; that even if such revolutionary change could have been explained to Mr. Fayerweather's comprehension, it was highly improbable that a lawyer of independent position and Mr. Butler's standing would have been party to such a testamentary act so contrary to the previous ones on November 11th and at the point of death of the testator; that no reference thereto was
F. 800 made at the time when Mr. Fayerweather's name was placed at the foot of the codicil of November 15th; that as there was no one in Mr. Fayerweather's room who knew about it sufficient to explain or comment on it, it was not intended that any one should explain the effect of the November 15th codicil upon that of November 11th, that the only version of any explanation was one made by one of Ritch's clerks consisting of the reading of part of the will and codicil then executed, that this clerk supposed that the codicil and the tenth clause of the will were all that the dying man needed, to understand the effect of the paper then being executed; that this clerk testified that Mr. Fayerweather expressed his

assent by nods and said nothing except a comment upon the poor signature he was making upon the brink of eternity; that he, the clerk, inferred that Mr. Fayerweather understood what he was doing by his intelligent appearance, while the clerk who was explaining did not himself understand the effect of what he was doing because he was himself in ignorance of the codicil and of the occurrences of November 11th and of the fact that the codicil then being executed, although not in terms,

by necessary operation was in conflict with and
F. 801 nullified that of November 11th, 1890; that Mr.

Fayerweather's doctors testified that he was not at the time to which the execution of the codicil is attributed by the proponents in such a physical or mental condition as to understand or appreciate the nature of the act attributed to him or to have used his senses in the manner deposed to by the attesting witnesses, that one of Ritch's clerks held Mr. Fayerweather's hand while his name was being placed at the end of the codicil; that Vaughan actively exerted himself to prevent the presence of persons who were likely to interfere with the securing of the name to this paper, that he took pains to prevent the doctors from attending as witnesses, that he brought

Mr. Ritch's clerks, Mr. Ritch himself being barred
F. 802 access to Mr. Fayerweather by Mr. Fayerweather's

express wish, as attesting witnesses; that he prevented Mr. Fayerweather's spiritual pastor from having access to him or appearing at his dying bed, in violation of Mr. Fayerweather's express wish, and that Vaughan procured Miss Joyce, who was in ignorance of the contents of the envelope, to destroy an envelope which he said contained the codicil executed on November 11th, 1890, in the absence of Mr. Fayerweather in a room in which Mr. Fayerweather was not, and without any other authority from Mr. Fayerweather than a nod in answer to a question of Mr. Vaughan whether he wished "this" destroyed, which might as well have referred to the codi-

cil probated as the codicil of November 15, 1890, as to anything else; these circumstances being in evidence, or evidence being before the Surrogate upon the probate contest tending to support them, did you not perceive that even as to the question of will or no will the disclosure of the conversation as testified to by Mr. Vaughan in the Five College trial and the Exhibit OA were demanded by your own statement of the grounds you took towards the representatives of Mrs. Fayerweather, by the right of the contestants to the evidence as declared by you
F. 803 upon the reference before Mr. Dayton and in order not to draw you personally into what might be and appeared to be a stupendous fraud upon a dying man, as an active participant in the fraud?

Mr. Bovee: Defendants object to the stump speech contained in this question upon the ground that it is incompetent, containing assumptions of fact which have not been proven and cannot be proven. We object to the matter as irrelevant and immaterial to the issue presented upon the special plea. We further object upon the ground that it is incompetent and calling for the opinion and conclusion of the witness.

A. I decline to accept the statement of counsel that there appeared in the Surrogate's Court what his
F. 804 question assumes to have appeared, and I decline to express an opinion upon assumptions false in fact, the only purpose for which, so far as I can see, is to get a false assumption upon the record. I am here under subpœna from the counsel to testify to facts. I am willing to do so. I do not understand that I am to express opinions. I am unwilling and decline to express opinions upon assertions incorporated in questions which are untrue so far as I believe and so far as my knowledge goes and so far as I know.

366 Q. Do you mean to be understood as testifying that there was no evidence adduced in the Surrogate's trial that Vaughan about November 10, 1890, induced Mr.

Fayerweather to obtain from Ritch Mr. Fayerweather's will and codicils, in order to learn what testamentary dispositions he had made?

Mr. Bovee: We object to the question as incompetent, the Surrogate's record not having been introduced or put in evidence here and no interrogation can be permitted as to the contents of that record.

A. I mean exactly what I have testified to, nothing more and nothing less.

367 Q. You refuse to go through the various propositions enumerated in the long question preceding
F. 805 and state that there was not evidence as to each separate proposition adduced upon the Surrogate's contest, do you?

Mr. Bovee: We object to the question as incompetent.

(At the request of the witness, Question No. 367 was repeated by stenographer.)

A. The proceedings in the Surrogate's trial are matters of record, they speak for themselves; what they show or what they tend to show appears by the record itself. I do not understand that I am called upon to express an opinion upon the subject, nor do I understand that in answer to counsel whose witness I am if I
F. 806 express an opinion it is binding upon him or upon his client. I stand therefore upon a reference to the record. The question, if my memory serves me correctly asks about things outside of the record; it assumes certain things with reference to myself; those I know to be untrue.

Mr. Sherman: I move to strike out all the answer except that part thereof which begins "it assumes certain things with reference to myself" as not responsive.

368 Q. Have you not undertaken in your previous answer to deny that the propositions which were embodied in the long question as being matters as to which proof was given in the Surrogate's Court were subjects of

proof in the Surrogate's Court, or have you intended only to deny the question so far as it relates to what you did or intended?

(At the request of the witness, Question No. 368 was repeated by stenographer.)

A. I have intended to give exactly the answer which I did give, nothing more and nothing less.

369 Q. You deny that evidence was given in the
F. 807 Surrogate's contest tending to prove that Vaughan about November 10th, 1890, induced Mr. Fayerweather to obtain from Ritch Mr. Fayerweather's will and codicils in order to learn what testamentary dispositions he had made?

Mr. Bovee: We object to the question as incompetent, irrelevant and immaterial.

A. I am not here to admit or deny anything.

370 Q. Do you aver that upon your oath as a witness?

Mr. Bovee: Same objection.

A. I am not here to aver anything upon my oath as a witness except in answer to questions in respect of matters about which I know.

371 Q. Was there evidence given before the
F. 808 Surrogate upon the contest in the Fayerweather case that Vaughan after November 10th, 1890, induced Mr. Fayerweather to obtain from Ritch, Mr. Fayerweather's will and codicils in order to learn what testamentary dispositions he had made?

Mr. Bovee: We object. The record of the trial in the Surrogate's Court now in the possession of the counsel asking the question is the best evidence of whether there was or was not proof; also irrelevant and immaterial to the issue raised on the special pleas.

(At the request of the witness, Question No. 371 was repeated by stenographer.)

A. What testimony was given upon the trial before the Surrogate will appear by the record; what it shows or tended to show will appear by the record.

Mr. Sherman: Counsel for complainants offers in evidence all the testimony in the Surrogate's record in the matter of the probate of the Fayerweather will.

Mr. Bovee: We take the formal objection that the record in the Surrogate's Court is irrelevant and immaterial to the issues presented by the special plea, and this was manifested by the opinion of the counsel for
F. 809 the complainants when he moved to overrule the plea filed by one of the defendants by reason of duplicity, setting up the decision of the Surrogate's Court in addition to the decision in Amherst against Ritch.

Mr. Parsons: As counsel I want to have what they call the Surrogate's record marked.

Mr. Bovee: Is this the record from the Surrogate's Court produced by Marsac?

Mr. Sherman: Yes, and he is here.

(The book of minutes was marked "Complainants' Exhibit No. 1, January 30, 1901, C. B.")

372 Q. Mr. Parsons, while you were examining
F. 810 Mr. Reynolds you had the knowledge, did you not, that Miss Emma S. Fayerweather was in the room and sitting where she could hear all that you said?

Mr. Bovee: We object to it as irrelevant and immaterial.

A. I was not here when Miss Emma S. Fayerweather was examined so far as her examination proceeded, but when I was examining Mr. Reynolds there were two ladies in the room and I assumed that one of them was Miss or Mrs. Emma S. Fayerweather.

373 Q. Well, you knew she was, didn't you?

A. I know nothing whatever on the subject.

374 Q. You had seen her on the stand, had you not?

A. Never to my knowledge.

375 Q. Well, you had no doubt that what you said to Mr. Reynolds would reach over his head to her ears, had you?

Mr. Bovee: We object to it as incompetent, irrelevant and immaterial.

A. Anything which I said to Mr. Reynolds would reach the ears of anybody who was in the room.

376 Q. And you intended it to reach hers more especially, did you not?

F. 811 Mr. Bovee: We object to it as incompetent, irrelevant and immaterial.

A. I intended that Mr. Reynolds should be compelled, if possible to answer certain questions which I put to him with reference to his conduct, and if it related to Miss Emma S. Fayerweather in any way I assumed that she would hear what he said.

377 Q. And you intended to intimidate her by the tone and frame of the questions and addressing them to him in her hearing, did you not?

A. Just the reverse.

378 Q. Just the reverse?

A. Just the reverse. I had heard from Mr. Bovee who was present when Miss Emma S. Fayerweather

F. 812 was examined something in reference to her mode of testimony, and I was led to hope that if she were put upon the stand that she would do what the witness Reynolds was not willing to do.

Mr. Sherman: I move to strike out the answer commencing "I heard from Mr. Bovee" as not responsive.

379 Q. You endeavored by your line of questions to convey to her mind the idea that Mr. Reynolds was acting in bad faith towards her and trying to make a private arrangement for his own advantage and his wife's in breach of his obligations to Miss Fayerweather, did you not?

Mr. Bovee: We object to this question as incompetent,

as calling for conclusions as to testimony given by the witness, and the record of the testimony being the best evidence of what he did as counsel, and as irrelevant and immaterial.

(At the request of the witness, Question No. 379 was repeated by the stenographer.)

A. I can state exactly what I did do if desired.

380 Q. I desire you to give responsive answers to
F. 813 the questions.

A. The question does not state what my endeavor was.

381 Q. Did you ask Mr. Reynolds when Miss Fayerweather was here, holding in your hand what you claimed to be a letter justifying your question, this question, No. 732: "Is it not the fact that having been authorized by them to represent them in their claims against Mr. Fayerweather's estate you subsequently made an effort to bring about a settlement in which you threw them overboard altogether and said that if the provision could be made for you as Mrs. Fayerweather's executor and for Mrs. Reynolds, it would be a complete settlement of everything."

F. 814 Mr. Bovee: We object to the question as incompetent; the record of the examination of the witness Reynolds will speak for itself; and as irrelevant and immaterial and calling for conclusions.

A. I presume that I asked such a question, I certainly asked questions tending to show that the witness Reynolds had according to his own testimony, made efforts at settlement and that they did not include Miss Emma S. Fayerweather or Mrs. Achter; and during the time that I was examining Mr. Reynolds I did have in my possession or rather I was shown by Mr. Bovee a letter.

382 Q. I ask you to produce that letter?

A. I have not got it, I never saw it except during the few minutes that Mr. Bovee showed it to me.

Mr. Bovee: Counsel for the defendants states that when they have had the opportunity which was denied to them to-day of concluding the examination of Mr. Reynolds, if they see fit at that time upon his examination, they will produce that letter.

Mr. Sherman: I call on the counsel who has just spoken, upon his admission that the letter is within his power to produce it now.

F. 815 Mr. Bovee: I am here as counsel for some of the defendants to participate in a material and relevant examination upon the issues presented in this case and not upon an examination of a very different character such as this is now.

Mr. Sherman: Do you produce it?

Mr. Bovee: I have told you all that I have to say.

Mr. Sherman: You do not produce it.

363 Q. Mr. Parsons, if the letter should be produced, would it not show that the inference which you were endeavoring to give to Miss Fayerweather respecting Mr. Reynold's conduct was entirely unfounded, unjustified and untrue?

Mr. Bovee: Defendants object upon the ground that the question is incompetent in that it calls for conclu-

F. 816 sions to be drawn from the examination of the witness Reynolds, irrelevant and immaterial to the issue presented upon the special pleas.

(At the request of the witness, Question No. 383 was repeated by stenographer.)

A. Nothing of the kind. The inference that I drew came from the testimony of Mr. Reynolds himself. That made perfectly apparent to my mind that he was trying to obtain an individual settlement, was complaining that my obstinacy balked it, and that in connection with any such settlement, Miss Emma S. Fayerweather or Mrs. Achter were not stated to be included.

384 Q. You now place the impression that you endeavored to create in Miss Fayerweather's mind upon circumstances extrinsic to the letter, do you not?

Mr. Bovee: We object to the question as incompetent. The answer of the witness speaks for itself.

A. I do not endeavor to do anything. I had a certain conviction in my mind which was entirely independent of the letter and I had not seen the letter and upon that conviction I examined the witness Reynolds and disclosed that the situation was as I had as-
F. 817 sumed that it was. I did have certain information extrinsic of the record, but it did not come to me from any such letter.

385 Q. I think you have missed the point in my question, Mr. Parsons. I call your attention to the parade which you made before Miss Fayerweather of the letter so calculated as to create the impression that you were taking from some letter written by Mr. Reynolds a proposition made by him to settle this case in disregard of his obligations to Miss Fayerweather. Now will you state whether that letter contains anything of the kind?

(At the request of the witness, Question No. 385 was repeated by stenographer.)

F. 818

A. I made no parade of the kind asserted. The statement of counsel that I made such a parade is untrue and I decline to answer a question on any such false assumption.

386 Q. Instead of giving us your version of this letter which is in your power and capable of production here, why do you not produce it?

A. I again decline to answer upon the false assumption that the letter is within my power or capable of production by me. Mr. Bovee has within the last few minutes stated that the letter is in his possession and I do not propose to ask Mr. Bovee or if I can help it, to do

anything to prolong an examination which defies every rule of evidence which I know which the counsel time and again, both the present counsel and his associate have in effect declared to be irrelevant to the issue. I shall limit myself therefore to answering questions which call for testimony. And if Mr. Bovee sees fit at an appropriate time to produce the letter I take it for granted he will do so.

Mr. Sherman: I move to strike out so much of the answer as follows the words "or capable of produc-
F. 819 tion by me" as not responsive.

387 Q. By whom did the letter which you held while examining Mr. Reynolds as previously stated in the presence of Miss Fayerweather purport to be signed?

Mr. Bovee: We object to it as incompetent to interrogate a witness as to the contents of a paper which is not in evidence, and as irrelevant and immaterial to the issues presented by the special plea.

Mr. Sherman: Counsel for the complainants in view of the objection again calls upon the counsel for the defendants to produce the letter.

Mr. Bovee: Counsel for defendants states that he will produce the letter in his own time and in his own way upon the examination of Mr. Reynolds if he sees
F. 820 fit and that the counsel for the defendants does not propose to be intimidated or forced by counsel for complainants into the production of the letter at this time.

Mr. Sherman: The question is repeated.

(Question No. 387 repeated by stenographer.)

A. I am not so clear that I looked at the signature. I saw the letter but for a moment, read very little of it, but I take it for granted that it purported to be signed by John B. Reynolds.

388 Q. To whom did it purport to be addressed?

Mr. Bovee: Same objection.

A. I do not really remember that I noticed that. I had other information communicated to me this morning upon the subject which informs me that it purported to be addressed to Mr. Ritch.

Mr. Sherman: I move to strike out the answer after the first sentence as not responsive.

389 Q. Do you recall the date of the letter?

A. I do not.

390 Q. Well if not for parade and pictorial effect on Miss Fayerweather, for what purpose did you hold in your hand while you were asking this question of Mr. Reynolds a letter of which you know not the date, the person to whom it is addressed, the signer thereof, not apparently any matter of substance thereof, except to create in Miss Fayerweather's mind the false and misleading impression that you had a letter from Mr. Reynolds embodying the breach of faith which you attributed to him in your question?

F. 821

Mr. Bovee: The defendants object to the question as incompetent, there is no evidence in this case of anything pictorial or anything by way of parade by this witness and as irrelevant and immaterial to the issues presented by the special plea; and I admonish the witness not to be intimidated by the loud tone of voice and the furious appearance of the counsel for the complainants in conducting his examination.

F. 822

Mr. Sherman: Imperious appearance?

Mr. Bovee: Furious appearance.

(At the request of witness, Question No. 390 was repeated by stenographer.)

A. I will answer; but first let me state that the assumption in this question, like most of the counsel's assumptions is false. I had a certain belief as to the actions of Mr. John B. Reynolds. Upon that belief I was cross

examining him for the purpose of showing by his testimony that his object in this litigation was to see whether something could not be forced from somebody which would go to the benefit of himself and his wife, Mrs. Reynolds, and that it was not within his purpose that any part of what should be obtained, if anything could be obtained, should go to Miss Emma S. Fayerweather and Mrs. Achter. Furthermore I was examining him for the purpose of showing, and I have recently been informed that such was the case, that in the original set-
F. 823 tlement Mrs. Fayerweather had said that she would provide for Miss Emma S. Fayerweather and Mrs. Achter out of the Fayerweather money and property which came to her; and while I was conducting that examination Mr. Bovee handed me this letter. I was not able at the time to give it attention, and I assume that when there did come a time I would have the opportunity of reading the letter, and as the testimony of the witness John B. Reynolds satisfied me it went out of my mind to look at the letter since. This morning I met Mr. Ritch coming downtown and he spoke about some such letter, and I attached what he said to that letter. Now you know all I know about it.

301 Q. Do you consider that you have in this
F. 824 long story explained anything responsive to my question, that is to say, what legitimate part in that questioning a letter bore which you held in your hand and feigned to be referring to during your questioning, and as to which as you now depose you know not the date, the person to whom it is addressed, the person by whom it is signed, nor any matter of substance thereof.

A. I do not feign anything.

392 Q. Did you address—

The Witness: I am going to answer this question and I do not propose—

Mr. Sherman: Do not scold; I will stand as little scolding as any man. Go along and answer it.

The Witness; I propose to answer the question without reference to the statement of counsel that I am to go on. If he puts questions I will answer them; he may withdraw them if he likes, but while they remain I will answer them. Now if you will repeat the question.

Mr. Sherman: I object to the repetition of the question as the question has been answered. I will ask another question.

F. 825 The Witness: The answer is not complete. If the counsel sees fit to prevent the completion of the answer I have not the physical power to prevent it.

Mr. Sherman: Since the witness says that he has a further responsive answer to make to the question let the stenographer take it, I will not interpose.

(Question No. 392 repeated by stenographer.)

The Witness: I assume from the fact that an intelligent lawyer like Mr. Bovee who is on the same side of the litigation as I am handed me that letter while I was pursuing that line of examination, it had some relevancy to it. I also assume that when I had the opportun-

F. 826 ity of looking at it if I thought it was relevant I would make it the occasion of further examination of John B. Reynolds. My examination grew out of voluntary statements made by him about what he stated to be proposed settlements, and the belief in my mind that those settlements as proposed by him or testified to by him did not include Miss Emma S. Fayerweather and Mrs. Achter. Futhermore, if this is what the counsel wishes to know, I have assumed that Miss Emma S. Fayerweather and Mrs. Achter were being used by Mr. Reynolds for the purposes of this litigation and I propose at some time to ascertain from them if they or either of them are put upon the stand, whether they are par-

ticipants in the scheme, the purpose of which is to violate what Mr. Coudert on the probate trial declared to be the cherished desire of Mr. Fayerweather, their uncle, entertained by him during his life time.

393 Q. All this is intended by you, is it not, to throw an apple of discord into the camp of the enemy so to speak?

A. Will you tell me who the enemy is?

394 Q. I infer from the arrogance and insolence with which you have spoken of Mr. Reynolds without
F. 827 apparent foundation that you consider him such, and in that sense I have asked this question, and I now ask you to answer it.

(At the request of the witness, Question No. 394 was repeated by the stenographer.)

A. I have probably in questions which I have put to Mr. Reynolds used an earnest tone, they have been prompted by a belief on my part of the unfounded character of or justification for his conduct, and I propose to avail of the opportunity when the opportunity is afforded to find out what good faith there is in this litigation, what bargain has been made for his benefit in respect of it, and
F. 828 what motives have inspired it.

Mr. Sherman: I move to strike out all the answer beginning "I propose to avail of the opportunity."

395 Q. Do you consider Mr. Reynolds worthy of your condemnation merely because he has brought a suit against John E. Parsons?

Mr. Bovee: We object to the question as incompetent, irrelevant and immaterial.

A. No.

396 Q. You are one of the defendants in the suit about which you have been talking, are you not?

Mr. Bovee: We object to it as incompetent. The pleading in that suit will show whether he is or is not

and as absolutely incompetent and irrelevant to the issues presented by the special plea.

A. I am named as a defendant. I have sought to ascertain whether the suits brought in the names of Emma S. Fayerweather and Mrs. Achter were brought by their authority, and up to this time I have failed to ascertain.

397 Q. What steps have you taken to ascertain whether their suits were brought by their authority.

A. I wrote or directed to be written to each of them a letter, and to that I received no response.

F. 829 398 Q. And you know very well that they received your letters, do you not? A. No.

399 Q. And you know that they regard inquiry as an insult? A. No.

400 Q. You know that damages are demanded in the complaints?

A. I know that there are three suits and that the three suits in the aggregate demand damages to the extent of nine millions of dollars.

401 Q. The present amount of the estate of Daniel B. Fayerweather with simple interest at six per cent. from the time it went into the hands of the executors

F. 830 is upwards of nine millions of dollars, is it not?

Mr. Bovee: We object to it as incompetent, irrelevant and immaterial.

A. The estate of Mr. Fayerweather has been very largely distributed in accordance with the judgment in the Five Colleges' suit. How much remains I do not know, but there is no such sum as that.

Mr. Sherman: I move to strike the answer out and repeat the question.

Mr. Parsons: I shall have to go.

Mr. Sherman: When shall we go on?

Mr. Parsons: I go into the Plant case to-morrow.

Adjourned to January 31, 1901, at 10:30 A. M.

COMPLAINANTS' PROOFS.

NEW YORK, January 31, 1901.

Met pursuant to adjournment. Present: The Examiner, Mr. Blaikie, Mr. Sherman, Mr. Bovee, Mr. Carnochan, Mr. Fain, Mr. Bishop, a representative of Root, Howard, Winthrop & Stimson, a representative of Russell & Holmes, and a representative of Nash & Jones.

F. 831

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

LACOMBE, *Circuit Judge.*

The testimony of any witness taken under the plea of Hamilton College may be read in evidence opportunity being given for objection and exception by any and every party against whom it is read; and the party reading such testimony must produce the witness for cross examination, January 30, 1901.

F. 832

Mr. Sherman: Counsel for the complainants reads in evidence in pursuance of the decision of the Circuit Judge from the record on file herein upon the pleas of the trustees of Hamilton College, the deposition of Elizabeth L. Goodwin at pages 88 to 102 of said record.

Mr. Bovee: Mr. Sherman, I suggest that you take up one at a time in order that I may present objections.

Mr. Sherman: One witness at a time do you mean?

Mr. Bovee: Yes.

Mr. Sherman: And I produce and tender said witness for cross examination.

Mr. Bovee: Is the witness here in the room?

Mr. Sherman: Yes.

Mr. Bovee: Have you entered any order on the decision of Judge Lacombe?

Mr. Sherman: It is not necessary; it is in the record.

Mr. Bovee: No order has been entered.

Mr. Sherman: The decision is an order, it is in the record.

Mr. Bovee: I understand counsel to state that no formal order has been entered upon the decision of Judge Lacombe with respect to the admission of this testimony.

I make the further suggestion, Mr. Sherman in order
F. 833 that the objections may be properly noted —

Mr. Sherman: Are you making it on the record?

Mr. Bovee: I make it on the record, yes, that you read the testimony from the record in order that the objections may be properly entered.

Mr. Sherman: Counsel for the complainants states that the object of the application to reproduce this testimony chiefly was to economize time, labor and expense, and that it is not apparent to the counsel how those objects can be served or how any useful purpose can be served by repeating from the record severally all the questions and answers; and offers to the counsel for the defendants a stipulation that any objections they see fit
to interpose may be filed with the record with the
F. 834 same force and effect as if they were severally taken
in connection with each question and answer. Why would it not be just as satisfactory to you, these question are all numbered and identified on the record, I do not insist on your filing them now, they might come in later.

Mr. Bovee: I think they should go into the record at this time and this place.

Mr. Sherman: Let it be understood that they shall be taken so.

Mr. Bovee: Then Mr. Sherman I will adopt this course of referring to the questions by their numbers as they appear in the record and putting my objections upon the record now. That will facilitate as to time.

Mr. Sherman: Just as you please.

Mr. Bovee: Counsel for the defendants object to reading into the record in this case the testimony of the witness Goodwin upon the ground that it is irrelevant, immaterial, incompetent, unauthorized, that the testimony of the witness Goodwin in chief was taken in a proceeding to which these defendants were not parties when counsel was not present to see and cross examine the witness, nor had the counsel for the defendants in this proceeding an opportunity to cross examine at that
F. 835 time, and that the only regular and proper course of procedure would be the production and examination of the witness at this time; furthermore, that although there has been a decision rendered by Judge Lacombe, no formal order has been made upon such decision authorizing such procedure. Mr. Sherman will you indicate to me who the lady is who is the witness?

Mr. Sherman: This is Mrs. Goodwin.

Mr. Bovee: Mr. Sherman I think you should produce the record from which you read and that must be a properly authenticated record. I do not want any confusion to arise with respect to my objections to these questions.

Mr. Sherman: Upon the suggestion of counsel I produce the original deposition of Elizabeth Lake
F. 836 Goodwin certified by the Examiner in this cause from the files of the Court. It runs from page 115 to 146

NEW YORK, September 30th, 1898.

Met pursuant to adjournment.

Present: The Examiner, Mr. Sherman, Mr. Blaikie, Mr. Bishop and Mr. Hume.

Mr. Bishop: I specifically object and except to the answers of the witness Vedder to direct questions Nos. 97, 98, 99, 100, 101, 102, 103, 104, 105,

106, 107, 108, 109, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 132 and 133, in addition to the grounds stated upon the record, upon the further ground that it appears that the relation of physician and patient existed between the witness and Mr. Fayerweather and that the witness was incompetent to testify or to make answer to any of the interrogatories specified, and I move to strike out each and every of the answers.

Mr. Sherman: Counsel for the complainants ob-
F. 837 jects to the interposition by Mr. Bishop at this time of these objections and this motion, on the ground that not having been taken by him at the time and the answers having been taken without any such objection, he is not at liberty at this time to take these objections effectively and that the last objection has been waived; and on the further ground that the objection is not applicable to the testimony in question.

Mr. Bishop: Counsel for the defendant states that the above objection and exception is taken for the purpose of making plain and certain the grounds of objection to the questions already interposed of incompetency and irrelevancy and in order to avoid the possibil-
F. 838 ity of any misapprehension before the examination of the witness is concluded.

ELIZABETH LAKE GOODWIN, called as a witness on behalf of the complainants, being duly sworn testified as follows:

Direct examination by Mr. Sherman:

1 Q. Where do you reside, Mrs. Goodwin, in the City of New York?

A. Yes, 358 West 51st street.

2 Q. What is your profession?

A. Well, massage treatment.

3 Q. Have you been a professional nurse for some years?

A. Well, yes, sir, as far as treatments.

4 Q. And have you attended many sick people in that capacity?

A. Yes, sir; a few hundreds or a thousand.

5 Q. And during what number of years has your experience extended?

A. From twenty-nine to thirty years.

F. 839 6 Q. Did you know the late Daniel B. Fayerweather in his life time?

A. Yes, sir; very well.

7 Q. And did you treat him and also his wife?

Mr. Bishop: Objected to as incompetent, irrelevant and immaterial, and as irrelevant and incompetent under the issues raised in this action.

A. Yes, sir.

8 Q. During what period did you treat Mrs. Fayerweather?

Mr. Bishop: Objected to upon the same grounds as above stated.

A. Well, off and on for a great many years, as much as fifteen years, I guess, from the first time I knew

F. 840 her.

9 Q. And down to the time of her death, or shortly before her death?

A. Yes, sir.

10 Q. Do you remember about when you last treated her?

A. Yes, I could tell exactly by looking on my book?

11 Q. Well, about the time, now, will answer, as nearly as you can answer without refreshing your memory.

Mr. Bishop: Objected to upon the same grounds as above stated.

A. Just about a week or two before she died; I treated her the week she went to the country.

12 Q. Do you remember the month that was and the year?

Mr. Bishop: That is objected to upon the same grounds as above stated.

A. Well, I could give you exactly.

13 Q. Was it in the summer time?

A. Yes, sir: she went into the country to spend the summer.

F. 841 14 Q. And that was in the second year following Mr. Fayerweather's death?

Mr. Bishop: That is objected to upon the same grounds as above stated.

A. Yes, sir.

15 Q. Do you remember when she died, about when?

A. Yes, I heard pretty soon after she went to the country that she was taken sick and died; of course, I was not there.

16 Q. No, but her funeral occurred in New York?

A. Yes, sir; I went to it.

17 Q. Do you know when it was, was it in the summer of 1891, the summer following?

A. Yes, I could tell exactly; of course, I have
F. 842 not got the dates; I could have got them but I did not think that I really needed them.

18 Q. It was about a year after Mr. Fayerweather's death that she died, was it?

Mr. Bishop: That is objected to upon the same grounds as above stated.

A. Yes, sir.

19 Q. And of what disease did she die?

Mr. Bishop: That is objected to on the same grounds as above stated.

A. Well, I do not know exactly, only I heard it was blood poisouing; I do not know as that was correct.

Mr. Bishop: I move to strike out the answer of the

witness, on the ground that it appears that she had no personal knowledge.

Mr. Sherman: I consent to that.

The Witness: She was troubled with diabetes, you know, when I treated her, for years.

20 Q. You mean you do not know whether that was the principal cause of her death?

A. No, I do not know, because I was not there.

21 Q. Did you administer massage treatment to Mr. Fayerweather prior to his death?

F. 843 Mr. Bishop: That is objected to upon the same grounds as above stated.

A. I did.

22 Q. And down to what time before his death?

Mr. Bishop: And that also is objected to upon the same grounds as above stated.

A. The night before he passed away.

23 Q. What day of the week was that that you were there last?

A. Friday.

24 Q. How continuously or how often had you administered massage to him before that?

Mr. Bishop: That is objected to upon the same grounds as before stated.

F. 844 A. Every evening.

25 Q. Was there a fixed hour when you went there?

Mr. Bishop: Objected to upon the grounds above stated.

A. Yes, sir.

26 Q. What hour was it?

A. Eight o'clock.

27 Q. Now state what was the customary course of events when you came there in that respect.

Mr. Bishop: That is objected to and this evidence is objected to upon the further ground that what the wit-

ness saw or heard in her capacity as a nurse is privileged and she is not competent to testify.

A. Friday evening—

28 Q. No, no; before Friday evening, what was the usual hour, at eight o'clock? What was done usually, that is the question now; we have not got to Friday evening yet.

A. Well, when I got there, sometimes I was there maybe a few minutes before eight and sometimes just on the minute, I had to be there prompt, and when
F. 845 I got there Mrs. Fayerweather would, if I got there before his lying down, Mrs. Fayerweather would see that he was in bed, and she would come to the door and say, "Mrs. Goodwin, Mr. Fayerweather is ready," and then I would go in the room and Mr. Fayerweather would say, "Good evening, Mrs. Goodwin," and I would say, "Good evening," and I would say, "How do you feel this evening?" "Well," he says, "about as usual; if anything; I slept pretty good last night." And I says, "I am glad of that." And sometimes he would say some other little thing and then sometimes he would not, and then I would commence my treatments. That was generally the way when he was—sometimes if I was a little early and if he felt just like it, he would speak
F. 846 of different things.

29 Q. And for how long before his death was that daily occurrence?

Mr. Bishop: That is objected to upon the same grounds stated in the objection to the last question.

A. Why, I was there every evening for weeks.

30 Q. For how long?

A. For quite a number of weeks; I could have got you exactly the number.

31 Q. Prior to your commencing to treat Mr. Fayerweather had you performed the same service for Mrs. Fayerweather for some time?

A. Yes, sir.

32 Q. And for how long, some years?

Mr. Bishop: That is objected to upon the ground that this evidence is incompetent, irrelevant and immaterial and not within the issues.

A. Yes, sir.

33 Q. Altogether, when the treatment was not daily, how long have you altogether administered your treatment to Mr. Fayerweather before his death?

Mr. Bishop: That is objected to as incompetent, irrelevant and immaterial, and as immaterial and irrele-
F. 847 vant under the issues in this action, and upon the ground that the witness is not competent to testify.

A. Why, off and on, between three and four years.

34 Q. Between three and four years?

A. At different times, you know, not all the time, not when he was out of the city, but when he was home.

35 Q. Well, did you become acquainted with his physical condition and state of health and peculiarities personal to him of various kinds?

Mr. Bishop: That is objected to upon the same grounds as stated above.

A. I certainly felt I did, I am sure.

36 Q. Now, do you remember the early part of
F. 848 the week in which he died, as to this, as to whether he was strong or feeble, whether he would move about without assistance, or required assistance?

Mr. Bishop: That is objected to upon the same grounds as stated above.

A. Am I to answer?

37 Q. Do you remember his condition the early part of that week?

A. Oh, yes, I remember very well.

38 Q. What was Mr. Fayerweather's usual attitude in bed during that period?

Mr. Bishop: Objected to upon the same grounds as above stated.

39 Q. Was he lying down or sitting up?

Mr. Bishop: Objected to upon the same grounds as above stated.

A. Always lying down when I came in.

40 Q. Was he lying prone, or was he raised up with pillows?

A. Why, he was laying easily in bed, don't you know, with pillows under his head.

41 Q. In the early part of the week of his death, and during the whole of that week, what was his con-
F. 849 dition in this respect, could he raise himself up in bed without assistance?

Mr. Bishop: That is objected to upon the same grounds as above stated.

A. He always needed a little assistance, and when he wanted to turn over I always told him to take hold of my arm and turned him over, and when I did not Mrs. Reynolds would do so.

42 Q. That is the lady who is now Mrs. Reynolds and who was then Miss Anner Amelia Joyce?

A. Yes, Miss Joyce.

43 Q. Was she in constant attendance upon him, so far as you know, when you were there?

A. Most sure she was, because Mrs. Fayer-
F. 850 weather was not able to.

44 Q. Did she administer his medicines to him, so far as you know?

Mr. Bishop: That question is objected to upon the same grounds as above.

A. She always give his medicines to him when I was there—I do not know if I should say that though.

45 Q. Was it necessary for him to turn over or move in the bed in order to facilitate your treatment of him?

Mr. Bishop: That is objected to upon the same grounds as above stated.

A. Certainly.

46 Q. And will you say whether or not during the last

week of his life he ever moved without assistance while he was in bed, to your knowledge?

Mr. Bishop: Objected to upon the same grounds as above stated.

A. When he turned over I always helped him, always, to turn over; he would always take hold of my arm. I would say "Take hold of my arm and raise up," and then he would raise up and give me his back when I was treating him.

47 Q. Well, was that assistance necessary to his supporting himself with your arm or to your using your muscular strength to move him?

F. 851

Mr. Bishop: That is objected to upon the same grounds as above, and also as leading.

A. Why, I done it to assist him, because he was very weak.

48 Q. Do you remember whether there was any change in his condition as to being weak or nervous or agitated during that week, the last week of his life, as you observed?

Mr. Bishop: That is objected to upon the same grounds.

A. I certainly did.

49 Q. Was it a change for the better or a change for the worse.

F. 852

Mr. Bishop: That is objected to upon the same grounds as above and also as calling for an opinion and not for any facts or circumstances.

A. For the better or for the worse did you say?

50 Q. Yes.

A. Well, for the worse for the two or three last days.

51 Q. About when did the change which impressed you occur in that week?

Mr. Bishop: Objected to as incompetent, irrelevant and immaterial, and as not within the issues in this action.

A. Well, along about Wednesday or Thursday I thought I could see a change.

52 Q. Well, now, will you describe as well as you are able what outward appearance impressed you which you describe as a change?

Mr. Bishop: That is objected to as incompetent, irrelevant and immaterial, not within the issues, and upon the ground that the witness is not competent.

A. Well, from the appearance of all the symptoms.

53 Q. Well, will you enumerate some of them? F. 853 State what were the details that impressed you, so that we may know the basis of your opinion.

Mr. Bishop: Objected to upon the same grounds as above.

A. Well, I thought he was more nervous and uneasy, and I said to his wife, "I think Mr. Fayerweather has had a kind of a shock or something, he acts so nervous."

Mr. Bishop: I move to strike out the answer of the witness as to the conversation she had with some other person.

54 Q. Is there anything else, have you finished your answer, Mrs. Goodwin? If you can think of anything else that answers that question I wish you would add it.

Mr. Bishop: That is objected to upon the same F. 854 grounds.

A. Well, that was Thursday and Friday. Do you mean Wednesday and Thursday?

55 Q. You are now describing this change, the symptoms and details of this change, and you have spoken about his nervousness and what you said to Mrs. Fayerweather; now I wish you would add any further facts responsive to my question as to any details at that time which impressed upon you that there was a change.

Mr. Bishop: That is objected to upon the same grounds as above stated.

A. Well, I said all of his symptoms appeared so different, that is, he acted so different from what he al-

ways had, and he was so nervous and uneasy and did not seem to rest so good, and I felt that he was growing much worse; I did not tell them, but I did not think he was going to live long, that was my opinion. But I did not want to say anything, because I wanted the doctors to do that.

Mr. Bishop: I ask to have stricken out the answer to the last question on the ground that it is not responsive and as being a statement of what the witness said to some other person, and not a statement of facts, and
F. 855 upon the ground that it is an opinion and conclusion that she is not qualified to express, and that she is incompetent.

56 Q. What was usually the determination of your massage treatment of Mr. Fayerweather prior to that first week when you ended, what was his condition, what followed?

Mr. Bishop: That is objected to as incompetent, irrelevant and immaterial, and not within the issues, and upon the ground that the witness is not competent to testify.

A. Do you mean the last treatment?

57 Q. No, I mean prior to that week, at the end of your daily treatment, what was his condition, what followed?

F. 856 Well, he always seemed—before this last week he always seemed kind of to revive and feel better and said he slept better, and it quieted his nerves, and I generally slipped out and left him asleep.

58 Q. Was that the case after the period when you noticed the change in him?

Mr. Bishop: Objected to upon the same grounds as above stated.

A. No, sir; it was not.

59 Q. In what respect was there a difference as to that?

Mr. Bishop: That is objected to upon the same grounds as above stated.

A. Why, he said he was so nervous he could not

sleep, and he seemed to be all uneasy and did not act like himself, like he usually had, because I would always slip out and leave him asleep, and afterwards he he seemed to be — he did not seem to sleep nor rest, he seemed to be all uneasy.

Mr. Bishop: One moment. I move to strike out the answer of the witness to the last question as not responsive and as expressing opinions and conjectures and suggestions of the witness and not any fact or circumstance.

60 Q. What was Mr. Fayerweather's condition
F. 857 in that last week as to being stout or emaciated, as to his being pallid or otherwise, as to his voice, as to whether it was strong or faint?

Mr. Bishop: That is objected to upon the same grounds as above stated.

A. Well, I thought his voice was very weak.

61 Q. And as to the other details that I asked you.

A. And his body, too.

62 Q. What?

A. He seemed to be very weak.

63 Q. What was Mr. Fayerweather's condition in that last week, as to his being stout or emaciated, as to his being pallid or otherwise, as to his voice, as to whether it was strong or faint?

F. 858 Mr. Bishop: That is objected to upon the same grounds as above stated.

A. Well, I thought his voice was weaker and his body seemed to be weaker.

64 Q. Well, was he stout or emaciated?

Mr. Bishop: That is objected to upon the same grounds as above, and upon the further ground that the witness has been already interrogated and has given her answers in full.

A. Well, he was—am I to answer the last question?

65 Q. As to whether he was stout or emaciated?

A. Well, he was emaciated, I think, and a little sick to his stomach very often.

66 Q. Have you any judgment as to the comparative weights of people, can you form a good judgment in your opinion as to about how much a person weighs?

Mr. Bishop: That is objected to upon the ground that it is not the proper way of qualifying a witness as an expert, if that is the purpose of the question; and upon the ground that it is incompetent, irrelevant and immaterial, and that the witness is not competent to testify.

A. Well, I do not know as I could guess at the weight, but I am sure he was very poor, his limbs
F. 859 and his whole body, he could not have weighed very much; I could not really estimate exactly, but I think he was about as poor a patient as I ever treated.

Mr. Bishop: I move to strike out the answer of the witness, and particularly the last paragraph.

67 Q. Was he pallid or otherwise?

Mr. Bishop: That is objected to upon the same grounds as above.

A. Very thin.

68 Q. Pale, I said?

A. Oh, pale—his face was the best part of him.

69 Q. He was pale, you say?

A. Yes, rather pale, and still his face always
F. 860 looked the best, he did not show his weakness so much in his face as he did in his body.

70 Q. Now, we come down to the Friday before his death. At what hour did you arrive at the house on that night?

Mr. Bishop: That is objected to as incompetent, irrelevant and immaterial.

A. At eight o'clock, sharp.

71 Q. And whom did you find there when you arrived?

Mr. Bishop: That is objected to upon the same grounds.

A. I found Miss Joyce, who is Mrs. Reynolds now, and Mrs. Fayerweather, as usual, and Mr. Fayerweather.

72 Q. Mr. Fayerweather's bedroom was the rear room,

that is, the north room on the second floor of the house, 11 East 57th street, in the City of New York, was it not?

A. Yes, sir.

73 Q. And what was the front room on that floor used for, the south room?

A. For a sitting room.

74 Q. And was there a passage way between the two rooms?

A. Yes, sir.

75 Q. About how long was it?

F. 861 A. Why, I should think it was quite as long as this room.

76 Q. About twenty feet?

A. I should think so.

77 Q. And how wide was it?

A. Well, I do not know the feet, but it was a good wide one.

78 Q. Was it fully as wide as that door?

A. Oh, yes.

79 Q. A little wider, if anything?

A. Yes, a little wider, I think.

80 Q. Nearly five feet wide?

A. I should think it was; you know, I never notice those things particular.

F. 862 81 Q. Where was the bed in the north room in which Mr. Fayerweather lay when you saw it?

Mr. Bishop: Objected to upon the same grounds as above stated.

A. It set with the head east.

82 Q. In the middle of that north room?

A. Yes, about the middle of the room, with the head east.

83 Q. With the head against the east wall on the room?

A. The head against the east wall.

84 Q. When you arrived there that night did you go first into the sitting room?

A. Yes, sir.

85 Q. And did either of the ladies go in there before you did to prepare him or for any other purpose, either Mrs. Fayerweather or Miss Joyce?

A. Yes, sir; Mrs. Fayerweather always went in first.

86 Q. And did she that night?

A. She was in when I went there.

87 Q. And then Miss Joyce was in the front room?

Mr. Bishop: I object to it upon the same grounds
F. 863 as above stated.

A. I think she was.

88 Q. Did Mrs. Fayerweather come out to you afterwards?

Mr. Bishop: That is objected to upon the same grounds as above stated.

A. She always come and she did this evening, she come to the door and said, "Mrs. Goodwin, Mr. Fayerweather is ready, and he is already in bed because he don't feel quite so well this evening."

Mr. Bishop: I move to strike out the portion of the answer as to what was stated by Mrs. Fayerweather.

89 Q. Did you then go into his room?

Mr. Bishop: That is objected to upon the same
F. 864 grounds as above.

A. I did.

90 Q. Well, what did you do then, what did you then observe?

Mr. Bishop: That is objected to upon the same ground as above, and upon the further ground that the witness is not competent to testify to anything that took place between herself and Mr. Fayerweather, upon the ground of professional privilege.

A. I went in as I always did, and I said, "Good evening, Mr. Fayerweather," and he didn't pay no attention to me, and he was a little hard of hearing, so I stepped up towards his head and put my hand on his fore-

head, and I said, "Good evening, Mr. Fayerweather, do you know I am here?" And he said, "Uh" (nodding). So I spoke the second time, I said, "Good evening, Mr. Fayerweather," and put my hand on his forehead like, I thought maybe he was dozing, and I said, "I am here," and he said, "Uh." And it was so unlike him, a kind of a shock went through me, and I kind of put my hand on his forehead, and he never said anything, and it was so unlike he had ever done before, and then I stepped back to the foot of the bed like, there was my little F. 865 chair there that I always used, and I put my hand under the cover on his limbs from the knees down and on his feet, and they felt very cold and there was a kind of a shock went over me and I said, "My Mr. Fayerweather is dying," and I waited a few minutes and I didn't say anything more and I got nervous myself, and at that I put the cover over him and slipped out into the room —

91 Q. Into the front room?

A. Into the front room, into the sitting room; and I said to the ladies, "I do not think I will disturb Mr. Fayerweather to-night, he seems so—I don't know—as if he had had a shock or something; he seems so quiet and drowsy, and don't seem to speak, and I don't F. 866 think I will disturb him, and I will come in to-morrow night," I said, "to see him," and Mrs. Fayerweather said, "Well, why, Mrs. Goodwin?" and I said, "Because I do not think it is best to disturb him," and I felt then that Mr. Fayerweather had a shock of death, but I did not say it, but I said, "I will come around to-morrow evening," and at that I went out, I did not tell them what I thought.

Mr. Bishop: I move to strike out the answer of the witness upon the ground—

The Witness: I did not quite finish that.

Mr. Bishop: Didn't you? Then I will wait.

The Witness: I said to Mrs. Fayerweather, "Mr.

Fayerweather has had a very bad shock of some kind, do you know?" and she says, "No, I don't." I didn't know whether it was paralysis or what.

Mr. Bishop: Now I move to strike out the answer of the witness and specifically those portions of the answer which relate to statements made by her to Mrs. Fayerweather and other persons, and also those portions of her answer which describe her own thoughts and mental operations which were not disclosed, and upon the ground that the entire interview is incompetent and that
F. 867 the witness is incompetent to testify about the same.

92 Q. I now ask you whether, from Mr. Fayerweather's conversation and appearance as you have detailed it and as you saw it and heard it, down to the Friday night in question, Mr. Fayerweather was in your opinion capable of comprehending or understanding a document or writing of any considerable length if it had been read over to him on that day or the next day?

Mr. Bishop: That is objected to as incompetent, irrelevant and immaterial, and not within the issues, and upon the further ground that it calls for the opinion of the witness and her conclusion, and not for facts and circumstances, and that the witness is not shown to be
F. 868 competent to render an opinion, and upon the further ground that the witness is incompetent to testify, because of her relations with the deceased, I mean to say that her testimony already shows that she was called in and was acting at that time in a professional capacity as a professional nurse, and upon the further ground that it calls for an opinion upon a state of facts at a time when the witness was not present, to witness, upon the day following her visit.

A. I do not think he was competent, not when I saw him last.

93 Q. What capacity when you saw him last had he to understand business matters, in your opinion?

M. Bishop: That is objected to upon all the grounds stated above.

A. Well, I think he was too feeble to be troubled with it at all; he as much as said so to me.

Mr. Bishop: I move to strike out specifically the last portion of that answer as not responsive.

94 Q. Aside from his statement to you, what do you say as to your opinion of his capacity when you last saw him alive, to understand business matters?

Mr. Bishop: That is objected to upon all the F. 869 grounds stated in my last objection.

A. Well, I do not think he was able to do any business at all the last time I saw him.

95 Q. In your opinion, what was his capacity when you last saw him to make an intelligent disposition of his property?

Mr. Bishop: That is objected to upon all the grounds stated above.

A. Well, I do not think he was capable at all when I last saw him.

96 Q. From his condition in that respect when you last saw him, what is your opinion as to his capacity the following day, the day of his death, to make an intelligent disposition of his property?

F. 870 Mr. Bishop: That is objected to upon all the grounds stated above, and upon the ground that it calls for the opinion of the witness on a condition existing at a time when she was not present.

A. Well, he must have changed very much in a few hours, if he was able to do anything.

97 B. Have you in your experience, Mrs. Goodwin, prior to that time, attended patients who were near the point of death and who died soon after?

Mr. Bishop: That is objected to as incompetent, irrelevant and immaterial, and not within the issues.

A. Yes, sir.

98 Q. Many?

A. A great many.

99 Q. And have you or not become familiar with the changes in the bodily and mental strength of people suffering from mortal diseases?

Mr. Bishop: That is objected to upon the same grounds as above stated, and also as not laying any foundation for an opinion on the part of the witness and not calling for any facts.

A. Yes, indeed, a good many, and I have never missed it.

F. 871 Q. Based upon that experience, I ask you whether when you last saw Mr. Fayerweather alive and awake, his mind and memory was sufficiently sound to enable him to know and understand the business in which he was engaged when, on the day of his death, an addition to his will was made which added to the residuary legatees of a large sum of money an additional person?

Mr. Bishop: That is objected to upon the ground that it is incompetent, irrelevant and immaterial and not within the issues, and upon the further ground that it calls for the opinion of the witness upon the condition of the testator at a time when the witness is not shown to have known what his condition was, and that the question is purely hypothetical and conjectural, and

F. 872 upon the further ground that the witness is incompetent to testify by reason of her professional relation.

A. I do not think he was capable, because I think he had lost his hearing and his eyesight.

101 Q. Do you mean to give—

A. I think he could hear and could see, but they were so weak that you would have to speak more than once to make him hear.

102 Q. Were there any other reasons besides his hearing and his eyesight which gives you the opinion which you expressed that he was not then capable of understanding that business?

Mr. Bishop: That is objected to upon the grounds stated in the objection to the previous question, and upon the further ground as assuming that the witness has testified to what she has not testified to.

A. Well, the reason why, because all those symptoms follow the last shock of death.

103 Q. What symptoms do you refer to?

Mr. Bishop: I object to that upon the same grounds as stated above.

A. They don't hear so plain and they don't see
F. 873 so clear, and I have had the experience of those things so much that I judged it from what had happened so many times that I knew it was true.

104 Q. In your opinion, based upon what you have stated that you observed, was Mr. Fayerweather able on the day of his death to understand the effect and operation of his will upon his property and those entitled to receive it?

Mr. Bishop: That is objected to upon the grounds stated in the objection to the previous question.

A. No, sir; not the last time I saw him.

105 Q. Was he able in your opinion the next day, based upon what you saw the previous day?

Mr. Bishop: That is objected to upon all the grounds stated in the objection to the previous question,
F. 874 including the objection that the question calls for an opinion upon a condition and state of facts existing subsequent to the time when the witness saw the deceased, and as to which she is not shown to have any personal knowledge.

A. No, sir; because—

Mr. Sherman: That is enough.

Mr. Bishop: Let her finish her answer.

The Witness: The next evening when I called they said he was dying, and I am sure he could not have been any better or else he would not have been dying.

Mr. Bishop: I ask to have stricken out so much of the

answer of the witness as to what was said about the following day.

106 Q. In communicating with Mr. Fayerweather when he was last awake when you were there, could he do more than answer simple questions?

Mr. Bishop: That is objected to upon all the grounds stated in the objection to the previous question, and upon the further ground that it is leading.

Mr. Sherman: The question is withdrawn.

107 Q. In what manner, when you last saw Mr.
F. 875 Fayerweather alive and awake, was your communication with him carried on?

Mr. Bishop: That is objected to upon all the grounds stated above, and objected to, also, as incompetent, irrelevant and immaterial and not within the issues, and upon the ground that the witness is not competent to testify because of her relations to the deceased, and upon the further ground that the witness has already been examined with regard to the interview and has stated what then and there took place and cannot be asked to characterize it.

A. Well, the last few days he had very little to say, and so far as business, he never talked to me; he said he would love to get strong enough and well enough
F. 876 to accomplish some little things he had in view.

108 Q. How recently did he say that?

Mr. Bishop: That is objected to as incompetent, irrelevant and immaterial and not within the issues, and upon the ground that the witness is not competent to testify.

A. Oh, a week or two before he died.

169 Q. In what manner, when you last saw Mr. Fayerweather alive and awake, was your communication with him carried on?

Mr. Bishop: You repeat the question and I repeat the same objection.

A. Well, very little; he did not talk very much, he never spoke of anything very particular, only he hoped

he would get strong enough and well enough, that he had a good many things in view that he would like to do. I used to encourage him once in a while and tell him—

110 Q. I do not think you quite understood my question?

A. I do not know as I did.

111 Q. Was Mr. Fayerweather able to articulate distinctly when you last saw him awake and alive, could he speak plainly and clearly?

Mr. Bishop: That is objected to as incompetent,
F. 877 irrelevant and immaterial, and not within the issues, and on the further ground that the witness is not competent because of her relations to the deceased to testify, and, further, that the question is leading.

A. Do you mean Friday evening?

112 Q. I mean Thursday, if that was the last time you saw him awake.

A. Wednesday and Thursday he said always as usual when I went in, only he seemed to have less to say—"Good evening," very low, "Good evening," very low, and he passed a few remarks and then—he was unlike what he had always been to me, and there was where I felt he was growing worse instead of better.

Mr. Bishop: I move to strike out the last an-
F. 878 swer as not responsive.

Mr. Sherman: You may cross-examine.

ELIZABETH GOODWIN.

Mr. Bishop: Now, Mr. Sherman, I want to reserve this cross-examination until Mr. Root comes here.

Mr. Sherman: I desire to have noted on the record that the complainants tender the witness for cross-examination.

Mr. Bishop: I desire to have the cross-examination postponed until Mr. Root comes here.

Mr. Sherman: I will consent to adjourn the cross-ex-

amination of this witness until two o'clock provided that you will stipulate on the record that we may take up the testimony of other witnesses in the meantime without any objection as to the order of proof.

Mr. Bishop: I do not see how Mr. Root can cross-examine until the testimony is written out.

Mr. Sherman: Mr. Examiner, I ask you to call upon the defendants to cross-examine this witness, and if they do not do it, I ask you to declare the examination closed.

The Examiner: The direct examination closed?

F. 879 Mr. Sherman: No, the examination. I have a right now to have her examination closed.

The Examiner: If the gentlemen want to have the cross-examination stand over until two o'clock, that can be done.

Mr. Sherman: I do not think you have any right to adjourn the cross-examination, under the circumstances.

The Examiner: I will let the whole matter stand over until two o'clock, and will direct the witness to be here at two o'clock for cross-examination, and if the counsel for the defendants is not ready to cross-examine the witness at that time, the witness may sign her deposition and the defendants will have to bring the witness back at further time at their own expense if they wish to

F. 880 cross-examine.

Mr. Sherman: Will you consent to go on with other witnesses in the meantime?

Mr. Bishop: Yes.

(Signed.) ELIZABETH GOODWIN.

Sworn to before me)
March 1st, 1899.)

John A. Shields,
Examiner.

Mr. Bovee: Defendants object specifically to Question No. 7 and the answer of the witness upon the ground that it is incompetent, irrelevant and immaterial to the issues raised by the special pleas.

Defendants make the same objection to Question No. 8 and the answer.

Same objection to Question No. 11 and the answer.

The same objection to Question 14 and the an-
F. 881 swer.

The same objection to Question 19 and the answer, and the further objection to the question on the ground that the witness states that she only knows by hearsay and that she has no personal knowledge. Defendants move to strike out the statement of the witness "She was troubled with diabetes, you know, when I treated her, for years" as not responsive to the question.

Defendants object to Question 21 and the answer of the witness upon the ground that it is incompetent, and irrelevant and immaterial to the issues presented upon the special pleas.

Defendants object to Question 24 and the answer upon the ground that it is irrelevant and immaterial to
F. 882 the issues presented by the special pleas and incompetent.

Same objection as to Question 25 and the answer.

Defendants object to Question 28 as irrelevant and immaterial to the issues presented by the special pleas and they move to strike out the answer of the witness as not responsive and incompetent.

Defendants object to Question 29 and the answer on the ground that it is irrelevant and immaterial to the issues presented upon the special pleas.

Same objection as to No. 30.

Same objection as to No. 31.

Same objection to No. 32.

Same objection to No. 33.

Same objection to No. 35.

Defendants object to Question No. 38 on the ground that it is irrelevant and immaterial to the issues presented under the special pleas.

Defendants object to Question No. 41 as irrelevant and immaterial to the issues presented upon the special pleas and upon the further ground that it is incompetent, as calling for the opinion and conclusion of the witness.

Defendants object to Question 43 and the answer
F. 883 of the witness on the ground that it is irrelevant and immaterial to the issues raised upon the special pleas and they move to strike out the answer of the witness as incompetent and as not responsive to the question, giving the conclusion and opinion of the witness.

Defendants object to Question 44 and the answer of the witness on the ground that it is irrelevant and immaterial.

Same objection as to 45 and the answer.

Same objection to 46 and the answer, and we move to strike out the answer of the witness as not responsive.

Defendants move to strike out the answer to Question 48 as not responsive and meaningless.

F. 884 Defendants object to Questions 49 and 50 as incompetent and calling for the opinion of the witness and not facts and to the testimony as irrelevant and immaterial to the issues on the special pleas.

Same objection as to Question 51 and the answer.

Defendants object to Question 52 as incompetent in that it calls for the opinion of the witness and not for facts, and as irrelevant and immaterial to the issues presented on the special pleas.

Same objection to Question 53 and we move to strike out the answer of the witness as not responsive to the question and as incompetent.

Defendents object to Question 55 as incompetent and

calling for the conclusion and opinion of the witness and irrelevant and immaterial to the issues and move to strike out the answer of the witness as incompetent and not responsive and expressing the opinion of the witness and not a fact.

Defendants object to question 56 and 57 as incompetent, calling for the opinion and conclusion of the witness and not facts. We object to the answer of the witness as irrelevant and immaterial to the issues presented upon the special plea.

F. 885 Same objection to Question 58 and the answer.

Same objection to Question 59 and the answer.

We move to strike out the answer of the witness to Question 59 as not responsive and as expressing her opinion.

Same objection to Question 60 and the answer.

Same objection to Question 61 and the answer.

Same objection to Question 62 and the answer.

Defendants object to Question 63 as incompetent and leading and as irrelevant and immaterial to the issues.

Same objection to Question 65 and the answer and we move to strike out the answer to Question 66 as not responsive to the question and incompetent and as expressing the opinion of the witness and not a fact.

F. 886 We object to Question 67 as irrelevant and immaterial to the issues.

Same objection to Question 68.

Same objection to Question 69.

Defendants object to Question 90 as irrelevant and immaterial to the issues presented upon the special pleas, incompetent in that the witness is not qualified, and further object on the ground of professional privilege.

We move to strike out the statement "it was so unlike him a kind of a shock went through me, I kind of put my hand on his forehead and he never said anything, and it was so unlike he had ever done before," as not responsive

to the question and as incompetent and expressing the conclusion of the witness.

We move to strike out the words "And there was a kind of a shock went over me and I got nervous myself."

Defendants object to Question 91 and the answer of the witness on the ground that it is irrelevant and immaterial to the issues presented by the special plea and as incompetent and expressing the opinion of the witness.

Defendants object to Question 92 as incompetent, irrelevant and immaterial and not within the issues,
F. 887 and on the ground that it calls for the opinion of the witness and not for facts and circumstances; the witness is not shown to be competent to render an opinion; upon the further ground that the witness is incompetent by reason of her relations to the deceased, she acting in a professional capacity as a professional nurse, and as also calling for the opinion of the witness as to the condition of the deceased at a time when the witness was not present, and we move to strike out the answer of the witness as not responsive.

The same objection to Question 93 and we move to strike out the words "he as much said to me" as not responsive to the question.

Defendants object to the Question 94 as irrelevant
F. 888 and immaterial to the issues presented upon the special pleas and as incompetent and calling for the opinion of the witness and not a fact.

The same objection to Question 95 and the answer.

Defendants object to Question 96 as irrelevant aud immaterial to the issues presented upon the special pleas and as incompetent and calling for the opinion of the witness on a condition existing at a time when she was not present, and we move to strike out the answer of the witness as not responsive and as incompetent.

Defendants object to Question 97 and the answer as irrelevant and immaterial.

The same objection to Question 99 and we move to

strike out the statement "I have never missed it" as not responsive.

Defendants object to Question 100 as irrelevant and immaterial to the issues as incompetent and calling for the opinion of the witness and not for facts particularly in calling for the opinion of the witness as to Mr. Fayerweather's condition at a time when the witness did not see him and on the further ground that the witness is incompetent to testify by reason of her professional relation to the deceased.

F. 889 Same objection to Question 101.

Same objection to Question 102 and we move to strike out the answer of the witness as not responsive and incompetent.

Same objection to Question 103 and the answer.

Defendants object to Question 104 as irrelevant and immaterial to the issues and as incompetent and calling for the opinion of the witness and not for facts, and that the witness is incompetent to testify by reason of her professional relations.

Defendants object to Question 105 upon the grounds stated in the previous objection, and upon the further ground that it calls for the opinion of the witness as to the condition of Mr. Fayerweather on the follow-

F. 890 ing day when she was not present and could have had no personal knowledge, and we move to strike out the answer of the question "the next afternoon when I called they said he was dying and I am sure he could not have been any better or else he would not have been dying" as incompetent and not responsive.

We object to Question 107 as irrelevant and immaterial and not within the issues and as incompetent because of the relation of the witness to the deceased, and we move to strike out the answer as not responsive to the question.

Same objection to Question 108.

Same objection to Question 109.

Same objection to Question 111.

We object to Question 118 as irrelevant and immaterial to the issues and as incompetent, and we move to strike out the words "He was unlike what he always had been to me and there was where I felt he was growing worse instead of better," as not responsive to the question and as incompetent.

Mr. Bovee: In your motion papers you ask leave to read the testimony of Mr. Ritch without any qualification or limitation, and a very large part of the testimony of Mr. Ritch was taken up with the inquiry as to
F. 891 the whereabouts of the will and codicils. I assume that you do not wish to put that into this record.

Mr. Sherman: Yes, I do. Oh, yes. Yes, I am going to examine you upon that too.

At this point a recess was taken until 1:30 P. M.

Mr. Sherman: Please note, Mr. Stenographer, that counsel for complainants again tenders the witness, Mrs. Elizabeth Lake Goodwin, for cross examination.

Mr. Bovee: The counsel for defendants insists that the testimony of the witness Goodwin introduced
F. 892 by the complainants shall be transcribed into the minutes with the objections made by counsel for the defendants placed in the appropriate place. Counsel for the defendants will proceed with the cross examination of the witness Goodwin. They do so under protest against being compelled to cross examine upon matters which are irrelevant to the issue raised by the special pleas, and in cross examining the witness they do not waive their objection that such matter is irrelevant and immaterial; they make a cross examination and insist that it is in the nature of a *de bene esse* examination, conditioned on the Court holding that the direct exam-

ination of the witness is relevant and material. Before proceeding with the cross examination they repeat the tender of the stipulation to strip the case of all irrelevant matter, meaning by that matter which is irrelevant to the only issue which they understand to be before the Court, that of estoppel by the judgment in the case of Amherst College and others against Ritch which they have pleaded in bar, and before proceeding with the cross examination defendants move upon the record to strike out all the testimony of the witness as irrelevant and immate-
F. 893 rial to the issue.

Mr. Sherman: Counsel for complainants does not acquiesce in the propositions stated by counsel for the defendants as qualifying their cross examination and insists that the effect of their cross examination shall be determined upon the rules of law applicable thereto. Counsel for complainants inquires of counsel for the defendants whether in his tender of a stipulation he includes the following testimony introduced on behalf of the defendants, that is to say the case on appeal or record of testimony attached to the judgment roll in the case of the trustees of Amherst College against Ritch and others, the briefs of the counsel for the complainants in the Court of Appeals in that action and their
F. 894 briefs at the General Term, all the the testimony of the witness John B. Reynolds, all the answers not responsive to questions of the witness John E. Parsons.

Mr. Bovee: As to the testimony of the witness Reynolds, counsel for the defendants state that their examination related to the citizenship of complainants any arrangement between the complainants and the witness Reynolds for the bringing of the suits and written communication from Mr. Coudert to Mrs. Fayerweather; as to the other matters of the examination of Mr. Reynolds they were under protest and occasioned by the examination of the witness by counsel for complainants, but as to

such matters counsel for defendants are indifferent whether those matters in the testimony of Reynolds remain or not, and they may be included in the stipulation or not as counsel for complainants desire.

Mr. Sherman: How about the case on appeal and the briefs?

Mr. Bovee: As to the case on appeal in Amherst College against Ritch and the briefs, those are matters pertaining to the issue of *res adjudicata* set up in the plea and relevant and material to that issue, constitut-
F. 895 ing the entire record of the Court out of which grew the judgment in bar. You do not say whether or not you include that in the stipulation; in other words you do not bring this argument to the point.

Mr. Bovee: I have said all that I care to say on the subject.

Mr. Sherman: Counsel for the complainants states that inasmuch as the tender of the stipulation as qualified by the last remarks of counsel for the defendants is so vague, evasive and inconclusive as not to clearly show what is intended to be embraced in the tender, the complainants are not enabled thereby to enter into any stipulation on the subject.

F. 896

ELIZABETH LAKE GOODWIN, having been produced for cross examination testified as follows:

Cross examination by Mr. Bovee:

113 XQ. Mrs. Goodwin, where do you reside?

A. I live at 254 West 129th street.

114 XQ. How long have you lived there?

A. I moved there in June, the first of June, this last June.

115 Q. June, 1900?

A. Yes, sir.

116 XQ. And where did you live prior to that?

A. I lived at 358 West 51st street.

117 XQ. How long did you live there?

A. Eight years.

118 XQ. Continuously?

A. Yes, sir.

119 XQ. That brought you down to 1892. Were you living in 51st street in 1894?

A. Yes, sir.

F. 897 120 XQ. What number did you say?

A. 358 West 51st street.

121 XQ. Were you living there in 1893?

A. Well, I think so. I would not be certain.

122 XQ. Well, where did you live before you moved to the 51st street house?

A. Where did I live before that?

123 XQ. Yes.

A. Well, I lived up in 40th street.

124 XQ. In 40th street?

A. Yes, sir.

155 XQ. And how long had you lived there?

A. Eight years going on nine.

126 XQ. Were you living in 40th street in 1890?

F. 898 A. Well, I could not exactly tell you the dates, but I should think so.

127 XQ. Do you know when Mr. Fayerweather died?

A. Yes, sir.

128 XQ. When?

A. The 15th of November.

129 XQ. In what year?

A. 1890.

130 XQ. Where were you living at that time?

A. 51st street.

131 XQ. In 51st street.

A. Yes, 358 West 51st street.

132 XQ. Now how long after the death of Mr. Fayer-

weather did you continue to live at this place in 51st street?

A. Why, I lived there until last June.

133 XQ. Until last June?

A. Until the year before last June.

144 XQ. Were you there all the time Mrs. Goodwin?

A. Yes, sir.

135 XQ. Constantly there?

A. I do not know where you mean.

136 XQ. As a home, were you always there?

F. 899 A. Yes, sir.

137 XQ. You were in business at that time?

A. Yes, sir.

138 XQ. What business?

A. Massage treatments.

139 XQ. Massage treatments?

A. Yes, sir.

140 XQ. Had you any other occupation at that time?

A. No, sir, only keeping house.

141 XQ. Is that a private house or an apartment house?

A. A private house. In 51st street it was a flat.

142 XQ. Were you living at this same house in 51st street in the year 1894?

A. Yes, sir.

F. 900 143 XQ. Were you at the same house in December, 1890? That is the month after the death of Mr. Fayerweather, Madam?

A. Yes, sir.

144 XQ. Were you there in January, 1891?

A. No, sir.

145 XQ. What?

A. 1891, you mean?

146 XQ. Yes, two months after the death of Mr. Fayerweather?

A. Yes, sir; I was there.

147 XQ. And in February, 1891?

A. Yes, sir.

148 XQ. And in March, 1891?

A. Yes, sir.

149 XQ. Your recollection is distinct that you were in the city at that time, is it?

A. Yes, sir.

150 XQ. And attending to your business?

A. Yes, sir.

151 XQ. And in January, 1894, where were you, in the city of New York?

A. Yes, sir.

F. 901 152 XQ. Attending to your business in the same way?

A. Yes, sir.

153 XQ. Throughout that entire month?

A. Yes, sir.

154 XQ. Have you ever been in any other business other than that of massage?

A. No, sir.

155 XQ. How long has that been your occupation, Madam?

A. About 32 years.

156 XQ. Thirty-two years?

A. Yes, sir.

157 XQ. Carried on here in the city of New

F. 902 York?

A. Yes, sir.

158 XQ. You are a married woman?

A. Yes, sir.

159 XQ. Is your husband living?

A. No, sir.

160 XQ. After the death of Mr. Fayerweather on the 15th of November, 1890, did you from time to time continue to see Mrs. Fayerweather?

A. Yes, sir.

161 XQ. How often?

A. Well, sometimes every night for a week; some-

times every other night. I could give you exact dates if I had my book.

162 xQ. Did you see Mrs. Fayerweather from time to time in the month of December, 1890?

A. That is right after Mr. Fayerweather's death?

163 xQ. Yes.

A. Yes, sir.

164 xQ. And is the same true of the month of January, 1891?

A. Yes, sir, until they went to California.

F. 903 165 xQ. Did they go to California in January, 1891?

A. Well, I could not say exactly what date, it was in February, I think.

166 xQ. 1891?

A. Yes, sir.

167 xQ. Did you know in February, 1891, of a contest over the will and codicils of Mr. Fayerweather?

A. Why I see it in the papers.

168 xQ. Is that all?

A. Yes, sir.

169 xQ. Did Mrs. Fayerweather never tell you?

A. She never told me the particulars, only she said she was going to.

F. 904 170 xQ. Now are you sure that Mrs. Fayerweather went to California in February, 1891?

A. Well, I wont be certain, I told you I could tell exactly if I had my books, I did not expect to go on the stand, don't you know.

171 xQ. When you gave the testimony which has been read in evidence here to-day did you have anything at that time from which to refresh your recollection?

A. No, sir.

172 xQ. Is your recollection any better in respect of the matters as to which you have testified than as to whether Mrs. Fayerweather went to California in January, February or at any other time?

A. Well, I could not tell exactly the month nor the day.

173 xQ. You have testified to conversations with various parties in the year 1890, have you not upon this record?

A. Yes, sir.

174 xQ. How is that you are able to testify as to the details of those conversations in the manner in which you have, and yet not be able to tell whether Mrs. Fayer-
weather went to California in January or Febru-
F. 905 ary of the year 1891?

A. I never testified to that.

175 xQ. I am trying to get you to testify to that, Madam?

A. Well, I say I cannot give you the exact dates. I could if you give me the time.

176 xQ. How is it that you cannot recall that fact when you can recall the details of conversations that you have given here upon this record?

A. That was before.

177 xQ. How long ago was it that you gave your testimony in this case, do you know?

A. I do not know exactly the date.

178 xQ. Well, was it two years ago or three
F. 906 years ago?

A. About a year ago I should think.

179 xQ. About a year ago. You mean that a year ago your recollection was better of what transpired in 1890 or 1891 than it is now?

A. Yes, sir, because it was fresh then.

180 xQ. Fresh?

A. I had the dates all down on my book and I can give them to you yet if yon will give me time to get them.

181 xQ. Is that the best answer you can give to my question, Madam?

A. Well, I do not want to guess at anything.

182 xQ. Do you know whether Mrs. Fayerweather went to California in January, 1890?

A. I know they went to California in January or February, and I won't be certain.

183 xQ. 1890?

A. 1891.

184 xQ. 1891?

A. I think it was. I won't be certain, I tell you, but I could give you exact.

185 xQ. That was the second month after the

F 907 death of Mr. Fayerweather, was it not?

A. No, sir.

186 xQ. January, 1891?

A. They did not go until the next winter.

Mr. Blaikie: Now you have got it right.

187 xQ. Then is your recollection that Mrs. Fayerweather went to California in January, 1892?

A. I think Mr. Fayerweather died in 1890 and she went in 1891, I think, the winter of 1891.

188 xQ. Did she go to California in the month of January, 1890, according to your best recollection?

Mr. Blaikie: She did not say so.

A. I do not know.

Mr. Bovee: Mr. Blaikie, I thank you not to in-

F. 908 terrupt me.

Mr. Blaikie: You said 1890, just now, you made a mistake.

The Witness: I aint going to testify to things I don't know anything about. I am only testifying to the truth and I have not got the dates exactly and I won't testify, because that was not my business.

189 xQ. Is it your recollection that Mrs. Fayerweather went to California in January, 1891?

Mr. Sherman: That is objected to on the ground that it has been answered four times, and that as a test of the strength of the memory of the witness that is a sufficient number of times.

Mr. Bovee: Answer the question, Madam.

A. I do not know what I am to answer, I do not know anything about it.

Mr. Bovee: Read it, Mr. Stenographer.

(Question 189 repeated by stenographer.)

A. I think she did. I won't be certain.

190 xQ. You think she did, now don't you know that in January, 1891, there was a contest pending in
F. 909 this city upon objections filed by Mrs. Fayerweather to the probate of the will and codicils of Mr. Fayerweather?

A. I know they went the next winter after Mr. Fayerweather died.

191 xQ. That would be 1892, would it not, Madam?

A. 1891 or 1892, I do not know exactly the dates.

192 xQ. Do you know whether Mrs. Fayerweather went to California in January, 1891, or not?

A. I think she did.

193 xQ. You think she did?

A. Yes, sir.

194 xQ. Did you see Mrs. Fayerweather in the month of December, 1890?

F. 910 A. Yes, sir.

195 xQ. How many times?

A. Well, I could not tell exactly the time, but I could give you exact if I had my book.

196 xQ. Can you tell me any one day in the month of December when of your recollection you saw Mrs. Fayerweather?

A. I have every day down, but I could not tell you just now. If you would give me time I can tell you.

197 xQ. Yes, Madam, you have told us that and I understand it quite distinctly now. I asked you if you can tell me any one day from memory in the month of December when you saw Mrs. Fayerweather?

A. In the month of November, I do not know, I used to go sometimes Mondays, I used to go sometimes Tuesdays, I used to go sometimes Wednesdays, I used to go sometimes Thursdays, I used to go sometimes Saturdays, sometimes Sundays.

198 xQ. Will you swear that you did see her in the month of December?

A. No, sir, I won't.

199 xQ. Will you swear positively that you saw Mrs. Fayerweather in the month of November, 1890?

F. 911 A. Yes, sir.

200 xQ. You did. How many times?

A. Well, I could not tell you exactly.

201 xQ. A dozen?

A. I should think so.

202 xQ. Tell me if you can any one day in the month of November, 1890, giving me the day of the week and the day of the month, when you saw Mrs. Fayerweather?

A. I cannot do it without you let me have my book and I will give you every day then and every date.

203 xQ. You cannot do it?

A. I can if you will let me have my book.

204 xQ. I am asking you now if you can give me any day and day of the week in the month of Novem-

F. 912 ber, 1890, when you can swear that you saw Mrs. Fayerweather?

A. No, sir, I could not go so far as to say — I could not give it to you correct without knowing it, I have got it down on my book and I can tell you every day and every date and everything.

205 xQ. But without refreshing your recollection from the examination of your book it is impossible for you now to state any one day in the month of November, 1890, when you saw Mrs. Fayerweather, is that right?

A. Well, I saw her every day while Mr. Fayerweather was sick there for about six weeks just before he died.

206 xQ. You give that testimony without refreshing your memory from the book.

A. Yes, sir; I can recollect that.

207 xQ. Now I ask you if you can tell me any one day in the month of December when you will swear you saw Mrs. Fayerweather?

A. I told you it might be Monday and it might be Tuesday, and it might be Wednesday, I would not swear to the day.

208 xQ. That is the best answer you can give I F. 913 suppose, is it, is that right?

A. Yes, I could not swear to the day when I do not remind myself of the day.

209 xQ. Well, will you swear that you saw her in the month of January, 1891?

A. I think I did.

210 xQ. You were in the city at that time?

A. Yes, sir.

211 xQ. Where Mrs. Fayerweather could reach you if she wanted you?

A. Yes, sir.

212 xQ. And that was during the month of December, 1890?

A. Yes, sir.

F. 914 213 xQ. And January, 1891? I am waiting Madam.

A. Well, I told you the best I can tell you.

214 xQ. You were in the city in January, 1891?

A. Yes, sir.

215 xQ. And if Mrs. Fayerweather desired to see you she knew where to send for you, didn't she?

A. Yes, sir.

216 xQ. So that you were where you could be reached by Mrs. Fayerweather if she wanted you?

A. Yes, sir.

217 xQ. And that was true in the month of February and March, was it not?

A. I do not know what you mean. I was home.

218 xQ. What is that?

A. I was in the city of New York.

219 xQ. And if Mrs. Fayerweather was in the city of New York she could reach you without any difficulty, could she not?

A. If she was in the city she could.

220 xQ. Do you know whether Mrs. Fayerweather was in the city in the month of February, 1891?

A. I think she was.

F. 915 xQ. You think she was. Will you swear that she was?

A. No, sir, I won't.

222 xQ. Then you will not swear that you saw Mrs. Fayerweather in the month of February, 1891?

A. No, sir, I won't. To my recollection I think they was away, I won't be certain.

223 xQ. That is your best recollection of the fact, is it?

A. Yes.

224 xQ. When you say you think they were away you mean you think they were in California, do you not?

A. Well, I do not know where they was, I didn't follow them about. I know they went away and that is all I know.

F. 916 225 xQ. Have you any knowledge of how long they were away at that time?

A. Not particular.

226 xQ. When you say they were away, who do you mean?

A. Why the family?

227 xQ. And who constituted the family?

A. Well, Mrs. Fayerweather and Miss Joyce, Mrs. Reynolds it was then I believe.

228 xQ. You mean the lady who is now Mrs. Reynolds?

A. Yes, sir.

229 xQ. Mrs. Anner Amelia Reynolds?

A. Yes, sir.

230 xQ. Who else?

A. I do not know about the particulars of it, that is none of my business.

231 xQ. Was Mr. Reynolds then a member of the family?

A. I suppose he was.

232 xQ. When did you first see Mr. Reynolds in the household of Mrs. Fayerweather?

Mr. Sherman: Objected to as not cross examination but independent evidence in chief at large in the F. 917 cause, and the counsel for complainants contends that by this course of examination the defendants overrule their plea and raise all the issues which can be raised under the several bills of complaint.

Mr. Bovee: Will you be kind enough to answer, Madam?

The Witness: What was the question?

(Question No. 232 repeated by stenographer.)

A. I never seen him until after he was married?

233 xQ. Do you know when that was?

A. No, I do not exactly. I know it was in the summer, the following summer after Mr. Fayer- F. 918 weather's death, I could not give you the dates, that was none of my business; I had my own business to look after; I did not trouble about the family matters.

234 xQ. It was after the occurrences to which you have testified upon the examination of counsel for complainants, was it not?

A. After or before?

235 xQ. Was it or was it not after or before?

Mr. Sherman: That is objected to as unintelligible.

Mr. Bovee: What is the answer.

A. I do not understand that quite.

236 xQ. Was the marriage to Mr. Reynolds to Miss Joyce before or after the occurrences to which you have testified upon your examination by counsel for complainants?

Mr. Sherman: Objected to as not cross examination, but as evidence at large in the cause.

A. It was after.

237 xQ. After, how long after.

A. Well, I could not tell exactly; it has been a good while.

F. 919 xQ. You could not tell. Is your memory of the day of the marriage of Mr. Reynolds or about when that marriage took place—

A. I was not there.

239 xQ. You were not present at the marriage?

A. No, sir.

240 xQ. Where were you?

A. I was home.

241 xQ. Where was your home?

A. 358 West 51st street.

242 xQ. Were you then going to the house of Mrs. Fayerweather?

A. I used to go and see Mrs. Fayerweather.

243 xQ. And Mrs. Reynolds lived at that house,

F. 920 did she not?

A. Yes, sir.

244 xQ. How soon after the marriage of Mrs. Reynolds did you learn of the fact, do you know?

Mr. Sherman: Objected to as not cross examination, but as evidence at large in the cause.

A. I heard they was married, that is all I know about it.

245 xQ. When did you hear that after the marriage, how soon after it?

Mr. Sherman: Same objection.

A. I heard they was married and went off on their wedding trip; that is all I know about it.

246 xQ. When did you hear that first?

Mr. Sherman: Same objection.

A. I heard it in the summer, I was in Saratoga and they was in Saratoga.

247 xQ. Do you know what year that was in?

A. I could not tell exactly, but I think it is in 1891 or 1892 or somewhere along there.

248 xQ. You do not know whether it was 1891 or 1892?

A. I think it was 1891, I would not be certain.

249 xQ. You think it was 1891, did I under-

F. 921 stand?

A. I said 1890 or 1891, I would not be certain.

250 xQ. You do not know whether it was 1890 or 1891?

A. No. That was none of my business.

251 xQ. Mrs. Goodwin, were you a witness on the probate contest in the Surrogate's Court over the wills and codicils of Mr. Fayerweather?

Mr. Sherman: Objected to on the ground that the Surrogate's record it being in evidence, is the best evidence, and as immaterial and irrelevant and as evidence at large in the cause.

Mr. Bovee: Answer, Madam.

The Witness: Will you please ask the question again.

F. 922 (Question 251 repeated by stenographer.)

A. No, sir.

252 xQ. Were you subpœnaed as a witness in that proceeding?

A. Yes, sir.

253 xQ. By whom?

A. Why by the Fayerweather estate, I do not know; I do not know anything about their business only I was summoned.

254 xQ. Did you go to the Surrogate's Court?

A. I was to Court.

255 xQ. Did you go to the Surrogate's Court?

A. I do not know whether it was the Surrogate's Court or what.

256 xQ. By whom were you subpœnaed?

A. Why, I suppose by the Fayerweather lawyers, I do not know who. I was to be a witness.

257 xQ. Who handed you the subpœna?

Mr. Sherman: Objected to as immaterial and not cross examination and as evidence at large in the cause.

A. Well, I do not know whether it was Mr. Blaikie or who it was.

F. 923 258 xQ. Was it Mr. Reynolds?

A. I really do not remember who it was.

259 xQ. You would not swear it was not Mr. Reynolds?

A. No, I think it was Mr. Reynolds' lawyer.

260 xQ. Do you remember his name?

A. No, sir, I was not acquainted with him at all.

261 xQ. Was it Mr. Reynolds?

A. I could not answer.

262 xQ. Was it Mr. James. Have you the subpœna?

A. I do not think I have.

263 xQ. What did you do with it?

A. Why, I suppose I done like hundreds of other papers when I moved I destroyed them.

264 xQ. You were not put upon the stand, how-

F. 924 ever, you were not asked any questions; is that right?

A. Yes, I was.

265 xQ. Were you? How long ago was that?

A. Why, I think it was a year ago or two.

266 xQ. Was that the contest over the will and codicils of Mr. Daniel B. Fayerweather in the Surrogate's Court in the city of New York?

A. I was a witness concerning Mr. Fayerweather's health.

267 xQ. Was that the contest before the Surrogate of the City and County of New York over the probate of his will and codicils?

Mr. Sherman: Objected to as not cross examination and as evidence at large in the cause, and on the ground that the truth in respect to the matter inquired of fully appears of record in this proceeding.

Mr. Bovee: If the truthfulness of the witness were quite as apparent as that fact, Mr. Sherman, there would not be any question about it at all.

Mr. Sherman: I move to strike out the comment of the counsel for the defendants as offensive, uncalled for, ungentlemanly and an outrageous breach of every
F. 925 consideration of propriety, and as being of a piece with the deliberate and systematic conduct of the counsel for the defendants to insult and deter the witnesses for the complainants from giving their testimony in the cause.

(At the request of the witness, Question No. 267 was repeated by the stenographer.)

A. I was a witness for Mr. Fayerweather, his health and his treatments, and I have been no witness for anything else.

268 xQ. Then you have been subpœnaed but once, is that right?

F. 926 A. That is all.

269 xQ. And the occasion as you now describe it when you gave the testimony is the only occasion when you have been called upon to give any testimony in respect to those matters; is that right?

A. Yes, sir.

270 xQ. Now as a matter of fact, Madam, the occasion when you gave the testimony that you speak of was right here in this building, was it not?

A. I do not think it was here.

271 xQ. You do not think it was?

A. Was it here? Perhaps it was here.

272 xQ. Do you know where it was?

273 xQ. In this room?

A. I believe it was; I would not swear to that.

274 xQ. And do you know whether that was one year or two years ago?

A. I think about a year ago.

275 xQ. About a year ago, are you sure of that?

A. I would not be certain.

276 xQ. Can you tell me in what month of the year it was?

A. What do you mean, the month of it?

F. 927 277 xQ. Yes.

A. I did not really remind myself of it and did not look in the book. I paid so little attention to it.

278 xQ. Madam, your memory is not a particularly good one, is it?

A. It is not.

279 xQ. And in order to recall events and circumstances, you do find it essential, do you not, to make notes, memoranda?

A. I always do.

280 xQ. Is that right, you always do?

A. Yes, sir.

281 xQ. And without such memoranda to refresh your memory is it possible for you to recall circum-

F. 928 stances which we will say occurred two years before?

A. No, sir, I can recall a great many things that

282 XQ. Why is it that you are not able to recall the month and the year in which you gave the testimony which you have now referred to?

A. I know well enough, but I could not be certain.

283 XQ. Now you are certain, are you not, Madam, that in the year 1891 you did not give any testimony with reference to Mr. Fayerweather, you are sure of that are you not?

A. I could not answer.

284 XQ. How about 1894, did you give any testimony in 1894?

A. No, sir.

285 XQ. Who was it examined you—you know Mr. Blaikie, do you not?

A. Yes, sir.

286 XQ. How long have you known him?

A. Well, not very long, when I was on the stand.

287 XQ. Do you know that he is the attorney for Mr. Roynolds?

F. 929 A. I do not know anything about it.

288 XQ. Was it Mr. Blaikie who examined you on this occasion that refer to when you gave testimony as to Mr. Fayerweather?

A. No, sir.

289 XQ. Do you know who it was?

A. Yes, sir.

290 XQ. Do you remember who was present at that time?

A. No, sir, not all. I know one or two.

291 XQ. One or two. Do you know of Mr. Sherman was present then?

A. Yes, sir.

292 xQ. He was the gentleman who examined F. 930 you, was he not?

A. Yes, sir.

293 xQ. Now Mr. Sherman is the only gentleman who has examined you in respect to these matters, is he not?

A. Yes, sir.

294 xQ. Mr. Blaikie has never examined you.

A. No, sir.

295 xQ. How long have you known Mr. John B. Reynolds?

Mr. Sherman: Objected to as not cross examination, but as evidence at large in the cause. Complainants repeat and insist that by this course of examination not justified by any *de bene esse* cross examination, the de-

fendants are giving evidence which overrules their plea and opens the cause at large.

Mr. Bovee: Go on, Madam.

The Witness: What was the question?

(Question 295 repeated by stenographer.)

A. Well, I guess five or six years.

296 xQ. Five or six years?

A. Yes, may be a little longer, I would not be F. 931 certain.

297 xQ. Madam, do you know whether or not you gave testimony in the case of Amherst College and others against Ritch in the Supreme Court in this city?

A. Yes, sir.

298 xQ. Did you testify in that action?

A. Well, I don't know; I testified to what I know and I don't know anything about Mr. Ritch, I don't know the man and I don't know any of them.

299 xQ. No, Madam, I did not ask you about Mr. Ritch, I asked you if you gave testimony in an action in the Supreme Court in which Amherst College and others were plaintiffs and Thomas G. Ritch and others were defendants in the Supreme Court of this State?

F. 932 Mr. Sherman: Objected to as already fully answered.

300 xQ. You do not know, did I understand you to say you did not know?

A. I told you I was a witness for Mr. Fayerweather's sickness and for the rest of it I don't know nothing about it.

301 xQ. That is all that you are able to testify about, is it, Madam?

A. Yes. The position and conditions of Mr. Fayerweather before he died.

302 xQ. And is that all that you can tell us?

A. Yes, sir.

303 xQ. And that was the only occasion on which you were subpœnaed or asked to come to Court; is that right?

Mr. Sherman: Objected to as already fully answered.

A. Yes, sir.

304 xQ. Have you talked with John B. Reynolds about the matters about which you have testified to?

A. No, sir, nothing particular, I just spoke about if I had to come down here.

305 xQ. Did he come to your house to see you?

F. 933 A. No, sir.

306 xQ. Did you go to the Fayerweather house?

A. Well, I do not understand you.

307 xQ. You know where the Fayerweather house is, don't you?

A. Yes, sir.

308 xQ. Where is it?

A. No. 11 East 57th street.

309 xQ. Before you gave the testimony that you have referred to did you go to the Fayerweather house?

A. Certainly.

310 xQ. Did you see Mr. John B. Reynolds?

A. Sometimes.

311 xQ. Did he tell you that he wanted you to

F. 934 come down here and testify?

A. No, sir.

312 xQ. He did not?

A. Not until I was summonsed.

313 xQ. Not until you were summonsed?

A. No, sir.

314 xQ. Did he speak to you after you were summonsed?

A. No, sir, I think not.

315 xQ. You will swear that you never had any conversation with Mr. John B. Reynolds on the subject that you were to give?

A. Very little.

316 xQ. Ah, then you did have some conversation with him, did you?

A. Well, I could not remind myself of anything much in particular.

317 xQ. Well, did he tell you what it was that he wanted you to testify to?

A. No, sir.

318 xQ. He did not?

A. No, sir.

319 xQ. Did you know before you came here to
F. 935 testify what it was you were going to be asked about?

A. No, sir, I did not.

320 xQ. Had you talked to Mr. Blaikie about the testimony that you were to give?

A. No, sir, never.

321 xQ. Or Mr. Sherman, the gentleman who examined you?

A. No, sir.

322 xQ. Had you ever seen Mr. Sherman before you were examined by him in this building?

A. I might have seen him but I was not acquainted with him at all.

F. 936 323 xQ. Where might you have seen him?

A. I do not remember. I do not know as I ever did see him until I seen him here. I would not swear to that.

Mr. Sherman: We take the precaution not to drill our witnesses, but we think the proof that comes from them spontaneously is most effective.

Mr. Bovee: Counsel for defendants do not take the statements of counsel for complainants—

Mr. Sherman: Counsel for the defendants will be obliged to take the record proof of Judge Arnoux in respect to his drilling of witnesses and also the drilling of witnesses in this case for the probate proceedings.

324 xQ. When did you first make the acquaintance of Daniel B. Fayerweather, Madam?

A. About 18 or 19 years ago.

325 xQ. Eighteen or nineteen years ago?

A. Nineteen or twenty I think it was when I first went there.

326 xQ. And did you at that time begin to give Mr. Fayerweather massage treatment?

A. No, sir.

327 xQ. You did not?

F. 937 A. No, sir.

328 xQ. Did you have any business relations with him at that time at all?

A. No, sir.

329 xQ. When did you first begin to treat Mr. Fayerweather professionally?

A. About four years before he died.

330 xQ. About four years before he died?

A. Yes, sir.

331 xQ. Administering massage treatment to him?

A. Yes, sir.

332 xQ. And how often, Madam, were you in the habit of treating him at that time?

A. Well, pretty near—some weeks every night.

F. 938 333 Some weeks every night?

A. Yes, sir.

334 xQ. And did that continue, Madam, down to the time—

A. Sometimes for five or six weeks.

335 xQ. And then there would be intermissions?

A. Yes, he might go away.

336 xQ. And then when he would come back you would continue?

A. Yes, sir.

337 xQ. The same as before?

A. Yes, sir.

338 xQ. And did that practice continue down to the

time of the death of Mr. Fayerweather in November, 1890?

A. Yes, sir.

339 xQ. And had you been in the habit of treating his wife, Mrs. Fayerweather, in the same way?

A. Yes, sir.

340 xQ. How long before the death of Mr. Fayerweather had you begun to treat Mrs. Fayerweather?

A. Oh, many years.

341 xQ. Many years?

F. 939 Yes, about 18 or 19 years.

342 xQ. When you first began to treat Mrs. Fayerweather how often was it your habit to treat her, daily?

A. Well, sometimes every day, sometimes three times a week, different sometimes, just according to how she felt.

343 xQ. And did that continue down to the time of Mrs. Fayerweather's death?

A. Well, yes,—before her death, of course, she went away.

344 xQ. Well, I mean when she was in the city?

A. Yes, sir.

345 xQ. They had no other operator but you I

F. 940 assume?

A. Not as I know of, they might.

346 xQ. And was this treatment of Mr. and Mrs. Fayerweather in the way that you have have testified always at the house No. 11 East 57th street?

A. Yes, sir.

347 xQ. Tell me if you will please the first day in the month of February, 1890, when you treated Mr. Fayerweather?

A. Well, I could not give you the first day.

348 xQ. No.

A. I tell you I can if I had known that I was going

to stay here, I could have told you the whole thing right up to mark.

349 xQ. Provided you had your notes with you?

A. Yes, sir.

350 xQ. Madam, will you permit me to ask if when you gave your testimony on the occasion to which you have referred and when you were examined by Mr. Sherman, if you had your notes with you?

A. No, sir, but I—

Mr. Bovee: That is enough.

F. 941 Mr. Sherman: I insist that the witness be allowed to finish her answer and not to be interrupted in this way in the middle of it. Finish your answer.

Mr. Bovee: I object. The witness says no and that answers my question.

Mr. Sherman: The counsel having interrupted the witness in the middle of her answer I insist that she be permitted to finish it. Now Mrs. Goodwin please complete your answer.

(Question No. 350 and the answer thereto repeated by stenographer.)

F. 942 The Witness: I said no, sir. Will I answer the other?

Mr. Sherman: Have you finished the answer?

The Witness: No, sir.

Mr. Sherman: Finish it then.

The Witness: No, sir, I referred to my book to get the dates right. That is all.

351 xQ. Did this memorandum which you say refreshed your recollection have any other dates upon it?

Mr. Sherman: Objected to on the ground that the book is the best evidence and that the counsel has already been informed by the witness that it can be produced if counsel desires it.

The Witness: What is the question again?

352 xQ. Is this memorandum any other than a memorandum of days?

A. Yes, sir, it is a book, there are a hundred patients in it.

353 xQ. That memorandum was used by you, was it to refresh your recollection before you were examined by counsel for the complainants?

A. No, sir, nothing particular only to get my dates right.

F. 943 354 xQ. You did not have the book here in court when you testified, did you?

A. No, sir.

355 xQ. Do you know Miss Emily R. Joyce?

A. Yes, sir, I know her.

Mr. Sherman: Emily R. Joyce?

Mr. Bovee: Is that not her name?

Mr. Sherman: No, Elizabeth R. Joyce?

356 xQ. Do you know Miss Elizabeth R. Joyce?

A. I know this lady, I do not know really what her given name is—Elizabeth, is it?

Mr. Sherman: That is Miss Emma S. Fayerweather.

Mr. Bovee: The lady indicated by the witness is Emma S. Fayerweather.

F. 944 357 xQ. There is no other lady in the room but Emma S. Fayerweather is there and yourself?

A. No, sir, that is all.

358 xQ. Now I ask you again if you know Miss Elizabeth R. Joyce?

A. Oh, yes, sir.

359 xQ. How long have you known her?

A. Oh, off and on for quite a number of years.

360 xQ. Did you see her in the month of January, 1891?

A. I think not, I would not be certain.

361 xQ. Did you see her in the month of December, 1890?

A. I could not be certain on dates, you know.

362 xQ. Or November, 1890?

Mr. Sherman: Objected to as not cross examination, as having no relation to anything inquired of this witness in chief, as not being therefore anything in any way connected with a possible *de bene esse* cross examination of the witness and as evidence at large in the case whereby complainants' counsel contends and will claim, if the interrogation be persisted in, that the defendants have overruled their plea and opened the matters at

F. 945 large in the cause.

363 xQ. Did you see Elizabeth R. Joyce in the month of November, 1890?

A. I would not be certain.

364 xQ. Do you know Mr. Edward Marshall Grout?

A. No, sir.

365 xQ. Did you see Mr. Edward Marshall Grout on the 15th of November, 1890?

A. No, sir.

366 xQ. Or Mr. J. Prentice Browning on that day?

A. I do not know any of those people that you are speaking about.

367 xQ. Did you see Elizabeth R. Joyce on the 15th of November, 1890?

F. 946 A. Not as I know of.

368 xQ. Do you know Mr. Henry B. Vaughan?

A. No, sir.

369 xQ. Did you see him on the 15th of November, 1890?

A. No, sir.

370 xQ. Did you see Mrs. Reynolds on the 15th of November, 1890?

A. Yes, sir.

371 xQ. Will you swear to that, are you positive about that, Mrs. Goodwin?

A. No, I would not be certain about the date.

372 xQ. Mrs. Goodwin, will you swear of your own

recollection that you saw Mrs. Fayerweather on the 15th of November, 1890?

A. Oh, yes, sir.

373 XQ. You swear to that?

A. Yes, sir.

374 XQ. You are positive about that, are you?

A. Yes, sir.

375 XQ. Where did you see her?

A. At their own house.

376 XQ. What time in the day?

F. 947 A, It was in the evening.

377 XQ. In the evening?

A. Yes, sir.

378 XQ. That is the only time you saw her, is it, on that day?

A. Why I saw her every evening when I went there.

379 XQ. Yes. Do you know what time in the evening it was?

A. Yes. sir.

380 XQ. What time?

A. I always went there at eight o'clock sharp.

381 XQ. And you are sure that on the night of the 15th of November, 1890, you saw Mrs. Fayerweather?

A. Yes, sir.

F. 948 382 XQ. Is there anyone else that you saw on that night?

A. I think I saw Mrs. Reynolds, Miss Joyce it was then.

383 XQ. Are you sure about that?

A. Yes, sir.

384 XQ. Did you see Mr. Fayerweather on that night?

A. Why I think Mr. Fayerweather—No, I did not see him.

385 XQ. You did not see him?

A. No, I did not go into see him.

386 XQ. Do you know Dr. Vedder?

A. Yes, sir.

387 XQ. How long have you known him?

A. Well, I am not very well acquainted with him. I just know him by meeting him up to Mr. Fayerweather's.

388 XQ. How long had you known Dr. Vedder prior to the death of Mr. Fayerweather?

A. Well, perhaps two or three years from the time I began to treat Mr. Fayerweather. He sent for me.

389 XQ. Who sent for you?

A. Dr. Vedder.

390 XQ. It was Dr. Vedder who introduced you F. 949 to Mr. Fayerweather, was it?

A. No, sir, I knew him long before that but I did not know Dr. Vedder at all then.

391 XQ. Did you see Dr. Vedder on the 15th of November, 1890?

A. No, sir.

392 XQ. On the 14th of November, 1890?

A. No, sir.

393 XQ. On the 13th of November, 1890?

A. No, sir, I never saw him there.

394 XQ. On the 12th of November, 1890?

A. Well, I would not go back to those dates you know.

395 XQ. On the 11th of November? Answer F. 950 me please, did you see Dr. Vedder on the 11th of November, 1890?

A. No, sir.

396 XQ. Did you not know John B. Reynolds in January, 1894?

A. Yes, sir, I think I did.

397 XQ. And you were in the city of New York at that time?

A. Yes, sir, I was in the city, I won't be certain abont how long it has been since I knew him.

398 XQ. And you were seeing Mrs. Reynolds and Mr. Reynolds from time to time then, were you not?

A. I used to see Mrs. Reynolds.

399 XQ. Yes, here in the city of New York?

A. Yes, sir.

400 XQ. In 57th street?

A. Yes, sir.

401 XQ. She knew where you were?

A. Yes, sir.

402 XQ. I understood you to say, Madam, that when you came down here to give testimony upon the occasion when you were examined by Mr. Sherman you did not know what you were to testify to, is that right,

F. 951 you had not talked with Mr. Sherman?

A. I knew I was to testify to Mr. Fayerweather's health and sickness, that is all I knew.

403 XQ. From whom had you learned that?

A Because I was there treating him.

404 XQ. Who told you that you were to testify to that?

A. Well, there did not anybody tell me that, that is all I knew.

405 XQ You did not know it until you came here and you were examined, is that right?

A. Certainly not.

406 XQ. Didn't you say a few moments ago that when you gave your testimony you did not have your memorandum book?

F. 952 A. Yes, sir.

407 XQ. Did you not also say that before you came down here you examined your memorandum book and refreshed your recollection?

A. I said that I looked at my book to see if my dates were correct.

408 XQ. Then you did know before you came here and when you looked at your book what matters it was you would be expected to testify to, did you not?

A. Well, that is all I knew, I could not testify to anything I did not know.

409 XQ. Now I ask you again, from whom had you

learned that, who had told you that you would be expected to testify to those things?

A. There didn't nobody tell me.

410 xQ. Nobody. That was your intuition, was it, that told you that you were to prepare on those subjects?

A. I was summonsed as a witness as to massage treatment for Mr. Fayerweather; that is all I knew.

411 xQ. Did your subpœna served upon you tell you that you were to be examined as a massage operator for Mr. Fayerweather?

F. 953 A. It did not say.

412 xQ. Then how did you know that you were to be examined as a massage operator for Mr. Fayerweather?

A. Because I knew.

413 xQ. Well, who told you that?

A. I told myself, that is all I had to testify.

414 xQ. And so you had no conversation with Mr. John B. Reynolds or any of his attorneys?

A. No, sir.

415 Or Mrs. Reynolds?

A. Well, we had talked about going to Court, but nothing about what was to be said or done. I was to simply come and tell the truth so far as I knew.

F. 954 416 xQ. When did Mrs. Fayerweather die?

A. Well, she died in the summer, I could not tell exactly the day, I was not there, I think she died in the country.

417 xQ. When did Mrs. Fayerweather die?

Mr. Sherman: Objected to as already fully answered.

Mr. Bovee: Answer Madam.

A. I could not tell you exactly.

418 xQ. Do you know what year it was in?

A. Why, yes, 1891?

419 xQ. In the summer of 1891?

A. I believe so.

420 xQ. Do you know where it was she died?

A. Well, I heard she was in Vermont.

421 XQ. I understand you to say that you had then given Mr. Fayerweather massage treatment for about three or four years before his death?

A. Yes, sir, three or four years.

422 xQ. Three or four years?

A. Yes, sir, I could give the exact dates of it if I had my book.

423 xQ. Yes, so I understand; you have told me. He was always in this same room, in this same bed?

F. 955 A. Yes, sir.

424 xQ. In this same bed?

A. Yes, sir.

425 xQ. And you would always go there at the same hour, eight o'clock in the evening?

A. Yes, sir.

426 xQ. And remain there for about an hour?

A. Yes, sir.

427 xQ. I understand you to say that you saw Mrs. Fayerweather on the 15th of November?

Mr. Sherman: Objected to as having been already answered.

A. I have answered that three or four times.

428 xQ. I will thank you to answer it again.

F. 956 Mr. Sherman: Objected to as having been already answered at least six times.

A. What, the night Mr. Fayerweather died?

429 xQ. Yes.

A. I tell you I cannot remember the dates exactly.

430 xQ. Did you see Mrs. Fayerweather on the 15th of November?

A. I think I did.

431 xQ. Did you have any conversation with her?

A. No, sir, nothing particular.

432 xQ. Are you able to remember anything which she said at all?

A. No, sir.

433 xQ. Did you see Mrs. Fayerweather on the 14th of November, 1890?

A. Well, I think so.

434 xQ. Did you see her on the 13th of November, 1890?

A. Well, I won't be certain of the dates.

435 xQ. Have you any recollection of seeing her on the 13th of November?

A. I seen her almost every day.

436 xQ. I am asking as to your recollection, your memory, Madam, whether you saw Mrs. Fayerweather on the 13th of November, 1890, will you swear that you did see her then?

F. 957

Mr. Sherman: Objected to as having been many times answered.

A. I won't say the date, I think I did though.

437 xQ. Will you swear that you saw her on the 13th of November, 1890?

A. I won't swear to the date because I do not know exactly.

438 xQ. You do not know?

A. I know I was very likely in the house but I did not always see her.

439 xQ. Then if you are not able to swear that you saw her on the 13th of November, 1890, you are not able to swear as to any conversation that you had with her on that day, are you?

F. 958

A. I saw Mrs. Fayerweather most every day for weeks, I could not really swear to the very day and date, but I think I saw her every day for six weeks pretty near. I did not always see her every time I was in the house.

440 xQ. Do you recall anything that Mrs. Fayerweather said to you in that period of time?

A. Yes, sir.

441 xQ. Distinctly?

A. Yes, sir.

442 xQ. On what day do you recall Mrs. Fayerweather saying anything to you in November, 1890?

A. Why she always spoke to me and talked to me when I went in.

443 xQ. Yes.

A. She would come to the door and say "Mr. Fayerweather is ready, Mrs. Goodwin."

444 xQ. Yes.

A. I never had much conversation with her, I went and done my work and went home.

F. 959 445 xQ. Did you see Mrs. Reynolds on the 15th of November, 1890?

A. Yes, sir.

446 xQ. At 57th street?

A. Yes, sir.

447 xQ. What time of the day?

A. Always in the evening.

448. Then you will swear that you were in the Fayerweather house on the night of the 15th of November, 1890, will you?

A. Yes, sir, I think so.

449 xQ. Are you sure of that, Madam?

A. Yes, sir.

Mr. Bovee: That is all.

F. 950

Re-direct examination by Mr. Sherman:

450 RDQ. Do you remember matters connected with your business more distinctly and clearly than the arbitrary dates and occurrences?

A. Yes, sir.

451 RDQ. You remember that you were at Mr. Fayerweather's house the night before he died?

A. Yes, sir, I do.

Mr. Bovee: We object to it as not re-direct examination. The witness has already been examined in chief.

452 RDQ. Do you remember whether you were at Mr. Fayerweather's house the night of his death?

A. Yes, sir.

453 RDQ. Were you there the night of his death?

A. Yes, sir,—no, not the night of his death, the night before he died the next morning.

454 RDQ. Do you remember whether you treated Mrs. Fayerweather after Mr. Fayerweather's death and for how long after his death you so treated her?

Mr. Bovee: We object to it as incompetent,
F. 961 irrelevant and immaterial and not within the issues presented by the special pleas.

A. Yes, sir.

455 RDQ. Do you mean by any testimony you have given in answer to Mr. Bovee to change or alter any of the testimony which you gave when you were examined in chief by him?

Mr. Bovee: I object to the question as incompetent, irrelevant and immaterial to the issue presented by the special pleas, and the evidence given by the witness is the best evidence of what the witness intended to do and as calling for her opinion and conclusion.

(Question 455 repeated by stenographer.)

F. 962

Mr. Bovee: And we object to the question as not in proper form.

Mr. Sherman: I object to these repeated objections.

Mr. Bovee: You can object as much as you please, but I propose to perform my duty and not to be intimidated or deterred by any declaration of yours, Mr. Sherman. You might just as well understand that now as at any time.

Mr. Sherman: Counsel for complainants objects to the persistent interruption of the answer by Mr. Bovee after he has iterated and re-iterated his objection, it being merely repetition of a long objection which is evi-

dently put upon the record for the deliberate purpose of misleading and confusing the witness and of preventing the counsel for complainants from getting a fair answer to his questions.

(Question No. 455 repeated by stenographer.)

A. Yes, because he has asked me questions that I know nothing about.

456 xQ. Have you intended by any answer you
F. 963 have given to him to make any change in the account which you formerly gave in this case concerning Mr. Fayerweather, the condition of his health and your treatments to him?

A. No, sir.

Mr. Bovee: One moment. We object to the question as improper and incompetent.

Mr. Sherman: That is all.

(Signed.) ELIZABETH GOODWIN.

Sworn to before me, this
21st day of June, 1901.

John A. Shields,
F. 964 Examiner.

TESTIMONY OF DR. JOHN A. IRWIN.

Mr. Sherman: I now read in evidence from the record on file upon the pleas of Hamilton College the deposition of John A. Irwin.

NEW YORK, January 11th, 1899.

Met pursuant to adjournment. *Present:* The Examiner, Mr. Sherman, Mr. Blaikie and Mr. Hume.

Adjourned to January 18th, 1899, at 3 p. m.

F. 965

NEW YORK, January 18th, 1899.

Met pursuant to adjournment. *Present:* The Examiner, Mr. Sherman, Mr. Blaikie and Mr. Hume.

JOHN ARTHUR IRWIN, called as a witness on behalf of the complainants, being duly sworn, testified as follows:

Direct examination by Mr. Sherman.

1 Q. You are a physician, sir, are you not?

A. Yes, sir.

F. 966 2 Q. And how long have you been a physician?

A. I have been engaged in medicine, sir, for 30 years; I have been qualified as a practising physician for over 25 years.

3 Q. And how long have you practised in this city?

A. Since 1883.

4 Q. Where do you reside?

A. 14 West 29th street.

5 Q. You have resided there some years, have you not? A. Eleven years, sir.

6 Q. Were you an attending physician upon Mrs. Daniel B. Fayerweather prior to her death?

A. Yes, sir.

7 Q. Do you remember when she died?

A. She died, I think, in July, 1892.

8 Q. Of what disease did she die, if you know?

A. Diabetes mellitus.

9 Q. For how long before her death was she afflicted with that disease?

A. I understand, sir, for about 13 or 14 years.

10 Q. Do you remember the occasion, the time of her husband's death on November 15, 1890, with reference to her condition?

F. 967 A. Yes, sir.

11 Q. What was her condition at that time with reference to this disease?

A. Her condition was more or less aggravated by the anxiety attendant upon her husband's death.

12 Q. Do you remember the occasion of the proceedings concerning her husband's will in the Surrogate's Court of New York County about Febuary or March, 1891?

A. Yes, sir.

13 Q. Were you present in the Court on some occasions during that proceeding?

A. On several occasions, sir.

14 Q. And did you accompany Mrs. Fayerweath-
F. 968 er's sister, Miss Anner Amelia Joyce, on those occasions or some of them?

A. I do not think I ever accompanied her to the Court, but I met her at the Court on more than one occasion.

15 Q. You knew her as an inmate of Mrs. Fayerweather's house? A. Yes, sir.

16 Q. And as her sister?

A. Yes, sir.

17 Q. What general relation to the household did Miss Joyce appear to have during that period of your acquaintance with her and down to the time of Mrs. Fayerweather's death.

A. Those of the most happy family relationship.

18 Q. Well, what part did she take in the household affairs?

A. Well, she seemed to supplement her sister's office, her sister being an invalid.

19 Q. Do you know Henry B. Vaughan?

A. I do not know him, sir, I have seen him.

20 Q. Do you know him by sight?

A. I know him by sight.

21 Q. Did you see him at any time in the Surro-
F. 969 gate's Court during the proceedings I have mentioned?

A. Yes, sir.

22 Q. Do you remember an occasion on the afternoon of some day when proceedings had been going on in the Surrogate's Court when Mr. Vaughan accosted Miss Joyce and spoke with her in a manner to attract your attention.

A. Yes, sir.

23 Q. Will you describe that scene as well as you can?

A. On that occasion the sitting of the Court had just ceased and the majority of the persons present had already left the Court or were leaving, and I had been sitting next to Miss Joyce during the proceedings, and according to my recollection we had already risen
F. 970 to leave, when Mr. Vaughan, coming up the aisle from the bench, called Miss Joyce to him, called her towards him; and for the moment, not knowing the nature of his conversation, I stood a little in the background, but the conversation was unusually animated, and I noticed that his manner was exceedingly excited and threatening, and consequently I approached and heard a part of the conversation. The part which I heard was, in substance, I did not note the words very closely at the time, but it was distinctly in substance that Mr. Vaughan intended to fight this matter out to the last cent of the estate, and that he directed Miss Joyce to tell her sister that, and that her sister had botter know the

matter, and in saying this he shook his fist in Miss Joyce's face in a very violent and threatening manner; and then I called Miss Joyce away and Mr. Vaughan left.

24 Q. Have you any knowledge as to whether Miss Joyce communicated this scene to her sister, Mrs. Fayerweather?

A. A general knowledge distinctly.

25 Q. State what you know about that?

A. Well, sir, I was in constant attendance on
F. 971 Mrs. Fayerweather at that time. During this period I think I saw her professionally on an average once or twice a day and I was present at various conversations bearing upon this matter, and I do not exactly remember whether I heard Miss Joyce tell this fact to her sister or not, but I am distinctly positive of the fact that she had told it to her sister, by my own conversation with her sister.

26 Q. What comments, if any, did Mrs. Fayerweather make upon these remarks in your hearing?

A. Mrs. Fayerweather, sir, was a little taciturn, I do not know anything different but she assented to the propositions which were put before her; she had received this message and apparently was very much
F. 972 shocked and terrorized by this message.

27 Q. Will you give in detail what occurrences you observed which you summarize by saying that she was terrorized by these remarks? What effect did it have on her that was perceptible to you as symptoms of something else?

A. Mrs. Fayerweather's general condition as the result of her disease, was one of unusual nervous irritation and a tendency to disturbance by annoyances great or small.

28 Q. Agitation, do you mean?

A. Not visible agitation, but the effect on her nervous system, as it is in all chronic diabetics, was that of

extreme irritability under nervous agitation or annoyances of any kind. These conditions were aggravated by any unusual annoyance or disturbance; and following this communication of this information, Mrs. Fayerweather's condition was very much aggravated for a considerable period.

29 Q. Has excitement any injurious effect upon a person suffering from diabetes?

A. Most distinctly and emphatically so.

30 Q. Is it a part of the recognized treatment of
F. 973 that disease to relieve and shield the patient from anything of that kind?

A. Distinctly to shield them from annoyances of any kind.

31 Q. What is the observed effect of unusual excitement or annoyance or anxiety upon a person suffering from diabetes?

A. The marked aggravation of pathological conditions, which is an excessive elimination of sugar or glucose in the urine, and also an aggravation of all the constitutional symptoms of debility and nervous depression; and the other general symptoms of the disease.

32 Q. Has a condition of disease from diabetes, aggravated in that manner which you have described,
F. 974 any effect on the firmness and vigor of the brain and of the will power?

A. Distinctly.

33 Q. How does it affect the vigor of the brain and of the will power, the firmness of the mind?

A. The disease, following its usual course, impairs the mental vigor so far as force and determination are concerned. Anything which aggravates the disease would in the same proportion lessen the will power, lessen the force of character.

34 Q. From what you have stated and from what you know of Mrs. Fayerweather's condition of mind and body about the month of March, 1891, was she in such a con-

dition that she could calmly weigh the various considerations that would enter in the execution by her of such a paper as, say, a release of all claims which she had or might have under her husband's will, or under the laws of this State on the subject of wills, affecting a property of very large amount, so that her act in executing such a paper or release would be regarded as rational or irrational?

A. May I hear that question again?

35 Q. (Question repeated.)

F. 975 A. Her condition would strongly influence her in favor of anything which would settle the question at issue and relieve her of the anxiety which she herself recognized as dependent thereon.

36 Q. What would you say about this point, doctor, would the existence of such physical and mental conditions as then existed in her as you have testified and as your knowledge goes, lead her to regard present peace of mind and freedom from mental distress as more important than any future acquisition of property?

A. I remember, sir, very distinctly urging that view upon her myself; I remember urging the view upon her that her immediate peace of mind and peace during the relatively short period of life which in all scientific

F. 976 probability was left to her, was more important to her than the future acquisition of any estate for her heirs or those who might come after her.

37 Q. And what response did she make, if any, to your advice so conveyed?

A. Well, sir, it was her custom to agree with all my advice. I had been her medical adviser, I think, for seven or eight years previously, and she believed in me absolutely.

38 Q. And was it subsequently to that advice so given that she executed the papers leading to the releases?

A. So I understand, sir.

39 Q. What fact, if any, can you state with regard to

her feeling at liberty to accept or reject the proposition of the executors of Mr. Fayerweather, I mean as to whether she felt she had entire freedom to accept or reject their propositions?

A. Well, I remember conversations in which it was imparted to me that her immediate condition was one of extreme straitness in money matters and that it was necessary for her to do something in order to meet her immediate expenses.

40 Q. What representation did she make as to
F. 977 the cause of her being straitened in money matters, what was in her mind on that matter that she conveyed to you?

A. That the executors of her husband's estate had refused to give her any money at all unless she agreed to the proposition proposed to her.

41 Q. Did she ever say anything before the execution of these papers in March, 1891, in your hearing, to indicate that she felt coerced or otherwise by Mr. Vaughan, and if so, what?

A. I do not remember her saying anything about Mr. Vaughan personally; he, of course, was discussed as an element in the coercion; but as far as I remember, it
was the executors generally, I think, with the ex-
F. 978 ception of Mr. Bulkley, who was regarded in the family at that time as being an entirely honest and straight forward element.

42 Q. Did Mrs. Fayerweather say anything in your hearing prior to the execution of the papers of March, 1891, in regard to the fact that Mr. Ritch was retained as an executor of Mr. Fayerweather?

A. Will you repeat the question?

43 Q. (Question repeated.)

A. I do not remember anything specific.

44 Q. Did Mrs. Fayerweather say anything prior to the execution of those papers as to whether the withholding of the money by the executors caused her any

inconvenience or worry, and if so, what did she say in your hearing?

A. She distinctly and on several occasions implied those facts, I do not remember her words, but it was implied to me that there was some, or a good deal, of embarrassment because of all moneys being withheld.

45 Q. She was then living in the house 11 East 57th street, New York?

A. Yes, sir.

46 Q. And that is a large house, the keeping of
F. 979 which would entail considerable expense, I believe?

A. Yes, very large, considerable.

47 Q. And had she any resources apparently except what she was entitled to from the executors, which was withheld?

A. Not that I was aware of.

48 Q. Well, did she ever convey anything herself to you on that subject?

A. It is impossible, sir, to state or to recall conversations, but my impression is that I was given to understand that.

49 Q. What was Mrs. Fayerweather's condition on the evening of the day on which Mr. Vaughan men-
F. 980 aced Miss Joyce, as you have testified?

A. I, sir, have refreshed my memory by looking over my accounts as to the dates that I attended the Court, and I think that that date—there is no note in my accounts on that subject, because it had not come up, it was simply the fact that I charged an attendance at Court that day—I think that day was the 2d of March.

50 Q. 1891?

A. 1891. And on that day I think I visited the house three times, and on the following day twice; and I think that Mrs. Fayerweather's condition at that particular period only largely by this fact in my accounts was very much aggravated or else I should not have attended

more than once every day or once every second day as was my custom at other times.

51 Q. And how did Mrs. Fayerweather's condition compare with the previous condition from the time of that interview to the execution of these papers in March, 1891?

A. She was very ill about that time.

52 Q. Well, are you able to say whether in your opinion her illness was to be ascribed to that cause or to some other cause?

F. 981 A. Distinctly to some extraneous cause, to some cause that was disturbing the natural course of her disease.

53 Q. Well, was that cause, the knowledge of her sister's interview with Mr. Vaughan, the only apparent cause of that aggravated condition?

A. So far as I am aware of.

54 Q. And was that cause sufficient to produce the symptoms which you have recalled and have testified to?

A. Very distinctly.

55 Q. Are you able to state what effect, if any, upon the termination of her disease was caused by the controversy over the will of her husband and its attendant excitement?

F. 982 A. Well, sir, Mrs. Fayerweather's case stands as a peculiar one in the records of medicine. She almost reached the extreme limit of her disease, as far as I am aware of. I attended her for I think about eight years prior to her death, but her disease had existed for a long period before that, I think for at least five years or perhaps six prior to my attendance; and fourteen years of diabetes is a very long period. Prior to Mrs. Fayerweather's death, from the time she came under me, I might say I was not her attendant, but I understand that a year or so prior to my attendance she suffered from diabetic coma, which is regarded usually as the termination of the disease; that during the period of my

attendance in the early part she improved very rapidly, the pathological signs of the disease were reduced to a minimum; that as I have already stated it is regarded by medical men as of the first importance that diabetic patients should be protected from all annoyance and worry; that at this period Mrs. Fayerweather's condition was very alarmingly aggravated so that if it had not subsequently improved the termination would have come very rapidly; that subsequently to this period Mrs. Fayerweather improved again and went on, I think, for
F. 983 nearly a year and a half, when the symptoms culminated in not an unusual termination of her disease.

56 Q. Well, speaking from a medical point of view of her condition, was the choice presented to her by this proposed settlement propounded by the executors, having regard to the symptoms produced by that interview with Mr. Vaughan as you have described, was the choice presented to her of continuing the contest over the will at the expense of her life, or accepting such terms as were proposed with the opportunity to live through the term of the disease?

A. I am satisfied that if the worry of that period had been continued in the same active shape Mrs.
F. 984 Fayerweather could not have lived more than a few months.

57 Q. And was that alternative distinctly presented to her by your advice?

A. By my advice, sir, very strongly, in every way and in every aspect.

58 Q. Had you any knowledge, doctor, of Mr. Fayerweather's physical condition for, say, two weeks prior to his death?

A. May I refer to a note I made from my book?

59 Q. Certainly, any memorandum which you think will refresh your memory.

A. (Referring to memorandum.) I last saw Mr.

Fayerweather on the 6th of October, 1890, by his special request, he sent for me.

Mr. Sherman: You may cross-examine, Mr. Hume.

Mr. Hume: I am not prepared to cross-examine and I will reserve my right to cross-examine until a future hearing, and will ask that the witness be produced at the next hearing for that purpose.

Mr. Sherman: You will have to produce the witness yourself unless you examine him now. Counsel for the complainants states that he has tendered the wit-
F. 985 ness for cross-examination after a session of about half an hour, and insists that the complainants will be under no obligation to produce the witness for cross-examination unless it shall proceed at this time.

The Examiner: I will order him to be here at the next session for cross-examination, but the defendant will have to pay his fees.

Mr. Hume: Unless notified that he will not be wanted.

The Examiner: Yes.

Adjourned to January 21st, 1899, at 3 p. m.

J. A. IRWIN, M. D.,
14 W. 29th Street, N. Y.

Sworn to before me this 15th day of March, 1899.

F. 986 John A. Shields,
Examiner.

Mr. Bovee: Is the witness tendered for cross-examination?

Mr. Sherman: Have you any objection to his deposition in chief?

Mr. Bovee: I would like to know if the witness Irwin is present and tendered for cross-examination?

Mr. Sherman: When the counsel for the defendants shall have completed the preliminary course which he announced today he would take of stating upon the record such objections as he desired to take to the examination

in chief of this witness, the counsel for complainants will produce the witness for cross-examination.

Mr. Bovee: Then the counsel for the defendants takes the statement of counsel for the complainants as a declaration that the witness is not present. We object to the reading of the deposition or the testimony of the witness Irwin as unauthorized and improper and not pursuant to any order of the Court authorizing and permitting such course; and defendants insist that the witness shall be produced and examined in the regular way, and that the defendants shall be afforded an opportunity to
F. 987 cross-examine the witness at the time. We object to the deposition or testimony as irrelevant and immaterial to the issues presented upon the special pleas and to the whole testimony as incompetent, as being evidence of relations between the the witness and Mr. Fayerweather acquired in a professional capacity as a violation of Section 834 of the Code.

Mr. Sherman: Counsel for the complainants states that the course of taking objections to specific questions was indicated by counsel for the defendants this morning as that course he should prefer to take, and that in reliance upon that statement counsel for complainants has not thought it necessary to have the witness, who is a practicing physician, sit by during a long period
F. 988 while the objections to his testimony in chief, which must precede his cross-examination were being taken; that that course has been further justified by the fact that Mr. Bovee spent upwards of an hour and a half in taking objections to the deposition of the witness in chief; and in view of all which facts, claims and contends that the counsel for the defendants has exercised the right given him by the ruling of the Circuit Judge to take objections, unless he shall now proceed to take further objections, and notifies the counsel for the defendants that Dr. Irwin will be produced at this place to-morrow afternoon at 2:30 o'clock, for cross-examination.

Mr. Bovee: Will you indicate to me where in the record which has been brought here of the testimony on the Hamilton College plea the testimony of this witness is?

Mr. Sherman: Page 270 to page 285 of the stenographer's minutes.

Mr. Bovee: Defendants object to question 8 upon the ground that it is incompetent and a violation of Section 834 of the Code calling for information acquired by the physician in his professional capacity as a physician; also as irrelevant and immaterial to the issue presented upon the special plea.

F. 989 The same objection as to question 9 and answer.

The same objection to question 10 and answer.

The same objection to question 11 and the further objection that it calls for the conclusion of the witness and not a fact.

Defendants object to question 12 and the answer on the ground that it is irrelevant and immaterial to the issues presented by the special plea.

Defendants object to the question 22 upon the ground that it is irrelevant and immaterial to the issues presented by the special plea, and object to the question as incompetent.

The defendants object to question 23 and the matter sought to be elicited upon the ground that it is ir-

F. 990 relevant and immaterial to the issues presented upon the special plea and as incompetent.

Defendants object to question 24 as irrelevant and immaterial to the issues presented by the special pleas.

Defendants object to question 25 on the ground that the matter sought to be elicited is irrelevant and immaterial to the issues presented by the special pleas, and we move to strike out the answer of the witness as not responsive to the question, and we move to strike out particularly the following words, "that I am distinctly positive of the fact that she had told it to her sister by my own conversation with her sister," the witness having previ-

ously said, "I do not exactly remember whether I heard Miss Joyce tell this fact to her sister or not."

Defendants object to question 26 as irrelevant and immaterial to the issues presented by the special pleas, and incompetent and move to strike out the answer of the witness as not responsive to the question, and as giving his conclusion and manifestly testifying to a fact not within his own knowledge.

Defendants object to question 27 as irrelevant and immaterial to the issues raised by the special pleas
F. 991 and as incompetent. We move to strike out the answer of the witness as incompetent and not responsive to the question and expressing the opinion of the witness, as a conclusion and not a fact; also upon the ground that the witness being the medical adviser of Mrs. Fayerweather, was incompetent to testify to her condition.

The same objection and the same motion as to the question 28 and the answer.

Defendants object to question 29 as irrelevant and immaterial to the special pleas, and as incompetent.

Same objection to question 30 and answer.

Same objection to question 31.

Defendants object to question 32 as irrelevant and
F. 992 immaterial to the issues presented by the special pleas; as incompetent, and calling for the opinion of the witness, and a violation of Section 834 of the Code.

Defendants object to question 33 as incompetent, irrelevant and immaterial to the issues presented by the special pleas.

Defendants object to question 34 and question 35, where it is repeated, as irrelevant and immaterial to the issues presented by the special pleas; as incompetent, and calling for the opinion acquired by the physician in his professional capacity, and calling for the opinion of the witness and not the fact.

Defendants object to question 36 as irrelevant and immaterial to the issues presented by the special pleas, and as incompetent and calling for the opinion of the witness and not the fact, and calling for the opinion acquired by the physician in his professional capacity in violation of Section 834 of the Code of Civil Procedure.

Defendants object to question 37 upon the same grounds.

Defendants object to question 38 as incompetent, and calling for the contents of written papers, those
F. 993 papers being the best evidence, and calling for the conclusion and opinion of the witness, and irrelevant and immaterial to the issues presented upon the special pleas.

We object to question 39 as irrelevant and immaterial and incompetent, in calling for the opinion and conclusion of the witness, and not a fact, and we move to strike out the answer of the witness as not responsive.

We object to question 40 as irrelevant and immaterial to the issues presented by the special pleas, and as incompetent.

We object to question 41 as irrelevant and immaterial and calling for the opinion of the witness.

F. 994 (The statement of objections suspended.)

Mr. Stimson: On behalf of Hamilton College, I wish to say, that while for the purpose of convenience we have asked Mr. Bovee and Mr. Parsons to take objections on behalf of Hamilton College together with their own clients, Hamilton College disclaims any attempt to cross-examine the witness Goodwin as she has been produced this afternoon.

Adjourned to February 1, 1901, at 10:30 a. m.

THOMAS E. MARSAC is re-called by the complainants and is tendered for cross-examination.

Mr. Bovee: Have you read in evidence here the testimony of Marsac taken on the Hamilton College plea?

Mr. Sherman: No, but now you speak of it I do not know but I will. Have you any cross-examina-
F. 995 tion?

Mr. Bovee: No cross-examination.

Mr. Sherman: The same cross-examination that there was in the other case?

Mr. Bovee: I understand that you have not read into the record yet the testimony of Marsac in the Hamilton College plea. Therefore, there is no cross-examination.

Mr. Parsons: I understand you propose to examine me.

Mr. Sherman: I understood that it was desired that you should conclude at this time if possible. Is not that right?

Mr. Parsons: I am satisfied.

F. 996

Continuation of the examination of *JOHN E. PARSONS.*

Mr. Sherman: You may cross-examine Mr. Parsons.

Mr. Bovee: The defendants will proceed with the cross-examination of Mr. Parsons. We do so under protest against being compelled to cross-examine upon matters which are irrelevant to the issue raised by the special pleas, and in doing so we do not waive our objection that

such matter is irrevelant and immaterial. We make a cross-examination and insist that it is in the nature of a *de bene esse* examination conditioned on the Court holding that the direct examination of the witness is relevant and material. Before proceeding with the cross-examination we repeat the tender of the stipulation to strip the case of all irrelevant matter, meaning by that matter which is irrelevant to the only issue which they understand to be before the Court, that of estoppel by the judgment in the case of Amherst College and others
F. 997 against Ritch, which they have pleaded in bar.

Mr. Sherman: The counsel for complainants does not acquiesce in the qualifications stated by counsel for defendants of the cross-examination of Mr. Parsons, but he insists that it shall have the ordinary legal effect.

Cross-examination by Mr. Bovee:

402 xQ. Mr. Parsons, where is your testimony you have referred to counsel for Mr. Reynolds in the proceedings of Amherst against Ritch; did counsel, whom you have referred to as appearing for Mr. Reynolds, also appear for other parties in that proceeding, and if so, whom?

Mr. Sherman: Objected to as incompetent.

A. Colonel James purported to appear and I assumed to represent Mrs. Emma S. Fayerweather
F. 998 and Mrs. Achter.

Mr. Sherman: I move to strike the answer out as involving a conclusion and the opinion of the witness.

403 xQ. Were you present, Mr. Parsons, in the Surrogate's Court when Mr. Vaughan gave his testimony on the probate trial?

A. I was.

404 xQ. Did you hear Mr. Vaughan testify with reference to the contents of the Butler codicil?

A. I did.

405 xQ. (Handing book) Are you able to say what he did testify with reference to that?

Mr. Sherman: Objected to on the ground that the

witness appears to be supplied by the examining counsel with a book, and that he appears to be reading from the book. That the record of the testimony is in evidence and is the best evidence, and that it is incompetent to contradict the record by this testimony. Counsel for the complainants further objects to the use by the witness of the book unless a legal foundation shall be laid for its use as a memorandum, and requests that his objection be certified to the Court.

A. My recollection corresponds with the testi-
F. 999 mony of Mr. Vaughan as appearing in the record of the probate contest, which, as has just been stated by Mr. Sherman, is in evidence. The testimony given by him upon that subject appears in folios 2005 and 2006 of the printed record.

Mr. Sherman: That has not been made the record; it was used for one day, whereupon Mr. Bovee insisted upon the production of the original minutes.

Mr. Bovee: Have you the minutes here that you introduced in evidence?

Mr. Sherman: I think Mr. Marsac has taken them back. I have not them here. I am not the custodian of them. I am perfectly content, if it ap-
pear on the record, that this printed book be
F. 1000 taken as the record, but until it shall be done it leads only to confusion.

The Witness: The proceedings on the trial before the Surrogate were taken by a stenographer and his minutes were printed as nearly as may be contemporaneously, and the printed record was distributed to the counsel concerned, all the counsel. A copy came to me. I read the printed copy when my memory was fresh with reference to what occurred, and my memory corresponds with what is shown by the printed record at folios 2005 and 2006, which reads thus, Mr. Vaughan being under examination by Mr. Coudert: "It," referring to the Butler codicil, "took the residuary legacy away from Mr. Bulkley and

Mr. Ritch. Q. Yes, and what did it do with it? A. I think it gave it according to the tenth paragraph of the will; I think that was it. Q. That is to say it restored the tenth paragraph of the will? A. I think that is the substance of it."

406 xQ. Mr. Parsons, you were present throughout the probate proceeding before the Surrogate?

A. I was. I will not say that I was there at every moment.

407 xQ. Do you recall the position taken by
F. 1001 counsel for contestants throughout that contest?

Mr. Sherman: Objected to as immaterial and incompetent.

A. I do.

408 xQ. Please to state what was the position taken by Mr. Coudert, representing Mrs. Fayerweather, and Judge Rollins, representing the nieces?

Mr. Sherman: Objected to on the ground that the position taken by the counsel mentioned will appear in the record; that it already appears that the position they took was taken without full knowledge of the facts and in ignorance of the facts and upon being misled by false representations of fact and the concealment of material facts represented to them not to exist, and because the
F. 1002 opinion of adverse counsel as to the contentions made by opposing counsel is the worst evidence that can be conceived of to establish that proposition.

A. The position taken by Messrs. Coudert and Rollins was manifested in several ways; first, by offers of testimony; next, by cross-examination of witnesses; again, by objections that were taken by them, and furthermore by argument. The record of the probate contest will show in principal part what the position taken by those gentlemen was. It is true of the probate contest as it is true of all such proceedings, that more or less was said by counsel which did not go down upon the record. Messrs. Coudert and Rollins generally by exam-

ination and cross-examination of witnesses, and in the ways to which I have referred, undertook to support their objections, the objections being, among others, of incompetency, want of mental capacity, undue influence, etc. Concurrently with this was the examination of witnesses and the introduction of evidence, principally the exhibits to which I have referred which, I have already stated upon this examination, were claimed by Messrs. Coudert and Rollins to bear upon their objections, but which in a way they acquiesced, principally related to a ques-
F. 1003 tion of whether there was or was not a trust in the residuary device to Messrs. Bulkley, Ritch and Vaughan. What position Mr. Coudert took upon that subject appears by the record. It appears by the passage from his argument which was introduced in evidence upon the examination in this proceeding of Mr. Reynolds. In a general way it was answered by the counsel for the executors that the very fact that it was claimed that Mr. Fayerweather had a purpose that his residuary estate should go to institutions, if it had any bearing upon the probate contest, was to establish that the will and codocils were his will. Counsel for the executors also claimed that the Surrogate had no jurisdiction to adjudicate a trust, aud that evidence
F. 1004 bearing upon that subject was immaterial and irrelevant. To what extent that appears by the record I can only tell by an examination of the record. In various ways it became manifest during the probate contest that the counsel—that Messrs. Coudert and Rollins were eliciting evidence upon the subject of a trust, as was thought by the counsel for the executors, for a subsequent and ulterior purpose and not as having any direct bearing upon the question of will or no will.

Mr. Sherman: I move to strike the answer out as not responsive; as consisting of the interpretation or motive placed upon the alleged action of Messrs. Coudert and Rollins in another proceeding from the standpoint of this

witness, on the ground that no consequences or inferences can be deduced from his opinion of the attitude or attempts or efforts of the opposing counsel as against the complainants herein, or either of them, and as incompetent, immaterial and irrelevant.

409 xQ. Were you present when the appeal was argued in the Court of Appeals in the Amherst College case?

Mr. Sherman: Objected to as immaterial

A. Yes.

410 xQ. Who represented Mr. Reynolds and
F. 1005 the complainants, Fayerweather and Achter?

Mr. Sherman: Same objection.

A. Colonel James assumed to represent them, stated that he represented them. His brief, if my memory serves me correctly, named them as his clients. To what extent he was authorized to speak for the present complainants, Mrs. Emma S. Fayerweather and Mrs. Achter, I do not know. I entertain no doubt that he was authorized to speak for Mr. Reynolds, because Mr. Reynolds was in attendance.

Mr. Sherman: I move to strike the answer out as not responsive and as incompetent and immaterial.

411 xQ. Was an argument made before the Court of Appeals on behalf of these parties, and if so, by
F. 1006 whom?

Mr. Sherman: Same objection.

A. Argument was made by Colonel James.

412 xQ. In what order was the case of the appellants presented to the Court? Do you recollect, Mr. Parsons, by counsel?

Mr. Sherman: Objected to as immaterial.

A. My recollection is that there was a struggle or at all events a question about who should have precedence, Colonel James insisting that he had the right to open the argument, and that in the end that right was conceded to him.

413 xQ. Do you remember what part of the time allotted to the case was given to Colonel James?

Mr. Sherman: Objected to as immaterial.

A. My recollection is that the Court said that as the case was very voluminous, whoever opened the case would need a large share of the time, and that there was given to Colonel James' opening a very considerable part of the entire time, he opening the case upon all questions.

414 xQ. And is it not a fact that Colonel James, representing the widow's executors and next of kin,

F. 1007 also closed the argument of that case?

Mr. Sherman: Objected to as immaterial and leading.

415 xQ. What is your recollection as to the closing of the argument, Mr. Parsons, in the Court of Appeals?

A. I have no recollection about it at this moment. I think that Colonel James was heard a second time, but whether his was the last argument I do not recall.

Mr. Sherman: I move to strike the answer out on the same grounds as objected.

416 xQ. By whom was the case of Mrs. Fayerweather's executor and next of kin presented in the argument at the General Term?

Mr. Sherman: Objected to as immaterial, and

F. 1008 on the further ground that this is not cross-examination of any matter inquired of in chief, either *de bene esse* or any other kind of cross-examination, and as new matter, whereupon the complainants insist that the defendants by giving evidence at large in the cause in this manner have overruled their pleas.

A. Whether Mr. Blaikie was the only counsel who was heard assuming to represent them or not, I do not quite recall; but certainly he was the most vehement on that side of the case. I can recollect his argument very well.

417 xQ. Were you present throughout the the trial of the case of Amherst vs. Ritch before Judge Truax?

A. I was generally present. So far as I recall I was present continuously.

418 XQ. Was Colonel James present and Mr. Blaikie?

A. Yes.

419 XQ. Representing whom?

Mr. Sherman: Objected to as incompetent and immaterial.

A. They assumed to represent Mr. Reynolds as executor, Mrs. Emma S. Fayerweather and Mrs. Achter; I say assumed to represent because of their author-
F. 1009 ity to represent Mrs. Emma S. Fayerweather and Mrs. Achter I have no knowledge. I have since then been led to entertain some doubt upon the subject.

420 XQ. What was the position taken by the gentlemen purporting to represent the widow's executor and next of kin upon the trial of that case?

Mr. Sherman: Wait a minute. Objected to as incompetent, irrelevant and immaterial, as not cross-examination upon any matter inquired of in chief, as evidence at large in the cause, and on the ground that the contentions made in the Five College action will best appear by the record, and that the opinion of opposing counsel as to contentions is the worst evidence, and not the best.

A. That the papers which have been admitted
F. 1010 to probate as constituting the will of Mr. Fayerweather were his will, that the absolute devise, residuary devise, to Messrs. Bulkley, Ritch and Vaughan was upon a trust which was in violation of the New York statute of 1860, and that in consequence up to one-half of Mr. Fayerweather's estate the widow and his next of kin were entitled as such, that the evidence looking to an expression of wishes on the part of Mr. Fayerweather for other institutions, and particularly the testimony which Mr. Vaughan gave about what occurred on November 15th, 1890, between him and Mr. Fayerweather was unnecessary and immaterial, that in either case there was a trust,

and that the releases from the widow and the next of kin had been obtained by fraud.

421 XQ. Mr. Parsons, in answer to question 17 you gave this testimony: "The persons referred to were represented by most competent counsel, Judge Rollins and Mr. Coudert. Those gentlemen were, as I assumed, as I believed, fully possessed of all information bearing upon the subject, and I have every reason to suppose that in the discharge of their duty they communicated to their clients such information as they had, upon which

F. 1011 subject I know nothing." There was a motion made after that answer to strike out as not responsive. I wish you would state whether or not Messrs. Coudert or Rollins, so far as you know, were possessed of all information bearing upon the subject?

Mr. Sherman: Objected to on the ground that the question involves the opinion of the witness or the conclusion of the witness of what the subject was, of what evidence bore upon it, and as to what Messrs. Coudert and Rollins had or had not in their possession or knowledge; as incompetent, as evidence at large in the cause, and on the ground that the question should have a tendency to elicit the facts from which the Court can draw the inference embodied in the question.

F. 1012 A. I can state what evidence they had so far as I know. Whether that is all they had of course I cannot state. I know that they were in possession of the evidence which was elicited upon the probate contest; I know that they were informed of what occurred between Mr. Fayerweather and Mr. Vaughan on the 15th of November, 1890, to which referred the memorandum on the paper, which has been spoken of as Exhibit OA, about other institutions; I know that they were informed about the exhibits which were in evidence upon the trial and which, or copies of which, had been put in Mr. Coudert's possession following the conference between Mr. Ritch and myself, to which I have already testified; I

know that they were informed about the so-called deed of gift. That deed of gift was produced upon the probate contest, I think on February 25th, 1891; whether it actually came in evidence or not I do not know, but it was made public at that time and in the presence and hearing of Mr. Coudert and Mr. Rollins. I know that Mr. Coudert had the information which is referred to in a note or letter which I, myself, wrote to him under date of February 14th, 1891, and which appears at pages 430 and 441 of the record of the Amherst College suit, or the Five Col-
F. 1013 leges suit.

422 XQ. Referring to the testimony given by Mr. Vaughan as to the contents of the Butler codicil, when he gave that testimony by whom was he examined?

A. Mr. Coudert.

423 XQ. Excepting Exhibit OA, the envelope, were all of the memoranda and exhibits produced by the executors in the Amherst College case produced upon the probate contest?

A. The record will show what were put in evidence; *they* were produced; they were produced both upon the probate contest and upon the trial before Judge Truax of the Amherst College suit. Whether all were put in evidence by Mr. Coudert and Mr. Rollins before
F. 1014 the Surrogate, and by Colonel James or other counsel upon the Truax trial I cannot remember, and the record will show.

424 XQ. And they were produced by you as counsel for the executors, were they not?

A. If you mean physically produced, I think I never had possession of those exhibits. I think they were in Mr. Ritch's possession and that they came to Court through the instrumentality of Judge Arnoux, who was Mr. Ritch's particular counsel.

425 XQ. Upon your direct examination, question 164, you were asked this question: "Did you not testify in the Dayton reference?" A. "I do not remember where

the memoranda were or in whose possession; I know that one that I regarded as of the greatest importance was in my possession." In connection with the question I state to the witness that if he desires it I will produce to him the record of his testimony in the Dayton reference to refresh his memory. You answered that question as follows: "I can only say what I have heretofore said; whether I gave that exact testimony I cannot recall; I do know that I was a witness upon the Dayton reference about other matters, and that occasion was taken to ask
F. 1015 me general questions, and reference was made to an envelope which has been spoken of as having been marked upon the Truax trial OA, and I can remember that I thought at the time, and I presume I testified, that there was one aspect of the situation in respect of which I regarded that as of importance, not, however, as having any bearing upon the probate contest. Its importance was in enabling Mr. Vaughan to refresh his recollection with reference to a conversation which he testified to have taken place between Mr. Fayerweather and himself on November 15th, 1890, which conversation he testified to upon the probate trial, and also upon the trial before Judge Truax, if my memory serves me correctly."

Counsel for the defendants then moved to strike
F. 1019 out that part of the answer commencing "I do know," and continuing to the end as not responsive. You were a witness upon the Dayton reference, were you not?

Mr. Sherman: One moment. I object to the question as improperly repeating to the witness a long question and answer previously given, as having a tendency merely to increase the expense to the complainants of taking the testimony without any apparent justification.

A. Yes, I was a witness in reference to some matters, for, upon one subject I should say, Mr. Blaikie had objected to—

Mr. Sherman: Objected to on the ground that the

witness appears to have answered the question and to be about to give an unresponsive further answer.

The Witness: Mr. Blaikie had objected to the fees of my office, and I understood the practice to require that the reasonableness of the charges should be supported, and I was examined upon that subject.

Mr. Sherman: I move to strike out the answer as not responsive after the first sentence.

426 XQ. You were examined at very considerable length?

Mr. Sherman: Objected to as immaterial.

F. 1017 A. About the length of my examination I can only draw inferences from the personnel of counsel who examined me.

Mr. Sherman: I move to strike the answer out as impertinent and not responsive.

427 XQ. Upon the trial of the Amherst College case did you there have the envelope Exhibit OA, and the letter which it contained?

A. It was there and it was within my reach as counsel, and I think very likely in my physical possession.

428 XQ. What efforts were made by you to introduce that envelope in evidence there, and what transpired in that connection?

Mr. Sherman: Objected to as immaterial and as

F. 1018 already very fully answered.

A. My recollection of what occurred is this: It was claimed by the counsel for the colleges and by Colonel James that there was a trust in favor of the colleges, that it was a trust corresponding with the codicil of November 11th, 1890, which had been spoken of as the Butler codicil, and which, according to the testimony, had been destroyed. I took the position that if any wishes by Mr. Fayerweather with reference to the action of Messrs. Bulkley, Ritch and Vaughan were to be in evidence, all said by him, or having any bearing upon the subject, should be in evidence; and that what Mr. Vaughan stated to have occurred on November 15th,

1890, in the conversation to which that memorandum applied showed that Mr. Fayerweather did not wish his residuary estate to go to colleges, or to the colleges mentioned in his will. I first tried to have Mr. Vanghan testify to that conversation. This was met with the objection that Mr. Vaughan was incompetent, and if my memory serves me correctly the objection was sustained. I then tried to see whether I could not get the matter before the Court by first getting in evidence the memorandum, and that was objected to, and my recollection is—
F. 1019 the record is better evidence than my memory—
that the objection was successful. Just how, in the end, the memorandum came in, I prefer to refer to the record to show. I know that it was worried into evidence against most strenuous objection that it was immaterial and incompetent and other objections; and having got the memorandum in, I used that as the point of the wedge to try and get in the conversation, and just how the conversation came in I fail at this moment to remember, but I know that the outcome was that by the use of the memorandum I got in evidence the conversation. But Judge Truax held, and he was sustained up to the Court of Appeals, that the conversation of the 15th of November, 1890, and the memorandum were of
F. 1020 no consequence; that they did not represent Mr. Fayerweather's wishes, but that his wishes were in favor of the colleges, or in other words he sustained the position taken adverse to the executors and was affirmed.

Mr. Sherman: I move to strike the answer out as not responsive, as immaterial and irrelevant, as not a competent mode of proof as to those matters which are material or relevant, as a contradiction of the record introduced in evidence by the defendants themselves, as mere inferences, deductions and conclusions of the witness from facts or circumstances not disclosed or in evidence.

The Witness: I wish to add in this connection that I

recognize that the record is the more exact statement than is furnished by my memory.

Mr. Sherman: I move to strike this answer out as immaterial and incompetent, and not called for by any question.

429 XQ. Mr. Parsons, this examination is with reference to matters to which you have testified, which the counsel for the complainants moved to strike out, brought out by the direct examination. In answer to question 194 you stated, after referring to the deed of gift F. 1021 and the beneficiaries named therein," I have always understood that it met with the approval of Mrs. Fayerweather, at all events I never heard anything to the contrary." What understanding did you have up to that time with reference to the instrument being approved by Mrs. Fayerweather?

Mr. Sherman: Objected to as calling for conclusions of the witness and not for any fact which can be relevant or competent here, as evidence at large in the cause and not cross-examination; that the basis for the alleged cross-examination consists of answers forced upon the complainants, not responsive to their questions, at which they protested at the time and moved to strike out.

A. On February 14th, 1891, I wrote Mr. Cou- F. 1022 dert a letter, of which this is a copy:

"Parsons, Shepard & Ogden,
Trinity Building,
111 Broadway,
New York, February 14th, 1891.

F. R. Coudert, Esq.

Dear Mr. Coudert—Referring to my talk a few days since with you, *re* Fayerweather, permit me to say, the charge having been made that Messrs. Bulkley, Ritch and Vaughan proposed to retain for their personal purposes Mr. Fayerweather's residuary estate, that it is not so, and to set at rest any doubts upon the subject they

are ready now or at any time to make such disposition of it as in their judgment will best honor Mr. Fayerweather's memory. If Mrs. Fayerweather has wishes in this regard, or if she knows of objects she thinks Mr. Fayerweather would have favored, they would be glad to be informed of it.

Another subject may well be put at rest." (I think it was, may as well.) "It has been asserted that the provision for Mrs. Fayerweather is inadequate. What Mr. Fayerweather's wishes were you know by his own hand-
F. 1023 writing. If, however, $15,000 a year is inadequate, Messrs. Bulkley, Ritch and Vaughan are satisfied that it would not be against Mr. Fayerweather's wishes that it should be increased, and it is their wish to increase it to any adequate amount. I speak directly for Mr. Bulkley and Mr. Vaughan. Mr. Ritch I feel sure will agree.

Yours truly,

John E. Parsons."

The letter is printed on pages 430 and 431 of the record of the Amherst College or Five College suit. A few days before that letter I had some conversation with Mr. Coudert in which he made me understand, just what his lan-
guage was I cannot recall, that he would claim in
F. 1024 the probate contest that Messrs. Bulkley, Ritch and Vaughan were trying to serve their personal ends, to obtain Mr. Fayerweather's residuary estate and to use it for their personal purposes. This was not so. Messrs. Bulkley, Ritch and Vaughan had previously determined that they would, and that during the probate contest they would dispose of whatever interest they might have in Mr. Fayerweather's residuary estate so that there should be no foundation whatever for any such charge. This was followed by my letter of February 14th, 1891, which refers to this conversation. On the probate trial the claim on behalf of Mrs. Fayerweather had been made by her counsel that—

Mr. Sherman: Please note, Mr. Stenographer, that the witness appears to be reading from what looks like the Five College Record, introduced in evidence, and that I object to his testifying therefrom.

The Witness: The witness states that he is not reading from the record of the Five Colleges suit.

Mr. Sherman: Counsel for complainants states, and asks the examiner to certify, that the witness has in front of him open, and that his eyes apparently from time to time are directed to the pages thereof, a large
F. 1025 printed volume, and that counsel for complainants objects to his referring upon his cross-examination to that or any other memorandum.

The Witness: To which the witness adds that the statement just made by the counsel for Mr. Reynolds is as accurate, or as inaccurate, as most of his statements; that if he will take the trouble to examine the record he will find that it does not contain what I have just stated and that it does not contain what I am about to state.

Mr. Sherman: Counsel for the complainants has not made any such statement such as that negatived by counsel, and he continues his protests and insists that the examination of the witness shall proceed in the actual presence of the Examiner.

F. 1025 (The Examiner was sent for.)

The Witness: On the probate trial the claim on behalf of Mrs. Fayerweather had been made by her counsel that $15,000 a year was inadequate for her. Among the memoranda, which I have referred to, was one in Mr. Fayerweather's handwriting which mentioned for Mrs. Fayerweather either $15,000 a year or some sum less than that. Without refreshing my memory my recollection would be that the amount was $12,000 a year. Mr. Coudert had referred to this provision for Mrs. Fayerweather as inadequate. It was to this that allusion was made in the latter part of my letter of February 14th, 1891.

Mr. Coudert, as I have said, before any talk about settlement, knew what had appeared upon the probate contest. Mr. Coudert knew the testimony which had been given by Mr. Vaughan about other institutions or put your heads together and find other institutions, as testified to by Mr. Vaughan; the conversation referred to by the memorandum, Exhibit OA, referred to one exhibit, OA. Subsequent to my letter, or about the time of my letter, of February 14th, 1891, Mr. Coudert was informed of the deed of gift; and as I have also stated he was
F. 1027 present when the deed of gift was produced upon the Surrogate's contest. I have a very positive recollection, which is my best recollection, that a copy of the deed of gift was furnished to Mr. Coudert, and was furnished to him for the purpose of learning whether its provisions corresponded or did not correspond with the wishes of Mrs. Fayerweather. My recollection would be that Mr. Coudert never said anything to the reverse of the provisions of the deed of gift as corresponding with Mrs. Fayerweather's wishes. I do not remember that he ever expressed himself affirmatively upon the subject. I know of no evidence and I know of no point which has come to my knowledge from that time down to this which was not in Mr. Coudert's possession at the time
F. 1028 referred to.

(At the request of Mr. Sherman Question No. 429 was repeated by stenographer.)

Mr. Sherman: I move to strike the answer out as not responsive, as incompetent, as involving the conclusions and inferences of the witness from facts not disclosed, as evidence at large in the cause, as not cross-examination of anything legitimately or properly stated by the witness in answer to any question on direct examination.

430 XQ. How many times did you see Mr. Coudert, Mr. Parsons, or have conversations with him in reference to the settlement?

Mr. Sherman: Objected to as already fully answered.

A. I certainly had one conversation. I think that I had certainly another conversation. I do not remember that I saw him more frequently than that.

431 XQ. At the time that you had those conversations did Mr. Coudert know of the conversations between Mr. Vaughan and Mr. Fayerweather of which Exhibit OA was a memorandum?

Mr. Sherman: Objected to as involving the conclusion of the witness, as not the proper mode of proof
F. 1029 of what Mr. Coudert knew or does not know, because it already appears from the testimony of the witness that Mr. Coudert knew nothing about Exhibit OA until it was produced in the Five College trial, and as incompetent, irrelevant and immaterial, and as evidence at large in the cause.

(At the request of the witness Question No. 431 was repeated by stenographer.)

A. My recollection is that the pencil memorandum on the envelope, which subsequently upon the Truax trial became marked Exhibit OA, related to what passed be-
between Mr. Fayerweather and Mr. Vaughan on
F. 1030 November 15th, 1890. Mr. Vaughan testified that in that conversation—testified upon the probate contest that in that conversation there did occur what the memorandum indicated. The memorandum of itself showed nothing other than a statement of subjects. Mr. Vaughan testified to the conversation itself. I wish to say of recollection, as well as part of the record of the contest trial that what then occurred informed Mr. Coudert fully of that conversation so far as I had any knowledge or information about it then, or have ever had such knowledge or information since; and the suggestion or any suggestion by anybody that Mr. Coudert made the settlement in ignorance upon that

subject is absolutely untrue and has no shadow of foundation.

Mr. Sherman: I move to strike the answer out as not responsive, as involving the conclusions and opinions of the witness, as a contradiction of the record in the Five College action, and as a contradiction of the record in the Surrogate's contest.

432 XQ. What if anything did you have to do with fixing the fees of Coudert and Rollins in that contest?

A. Absolutely nothing. I learned at the time,
F. 1031 and I think from Mr. Coudert, what was his charge and what was the charge of Judge Rollins. My impression would be, and I think I recall, the way in which it came about was in the wish to have checks arranged. I think that Mr. Coudert said that it was the wish of his clients that there should be separate checks. Whether there were separate checks in the end or not I do not recall.

Mr. Sherman: I move to strike out the answer after the first sentence as not responsive and as incompetent.

Mr. Bovee: That is all.

Re-direct examination by Mr. Sherman:

F. 1032 433 RDQ. So far as you know, did Mr. Coudert have any information at the time of the settlement or at the time of the delivery of the releases about the interview between Mr. Fayerweather and Mr. Vaughan which occurred on the 15th of November, 1890, except by the testimony given by Mr. Vaughan in the probate contest?

A. That was all the information that I had; whether Mr. Coudert had more information or not, how can I tell? He had no more information to my knowledge.

Mr. Sherman: That answers the question. That is all.

Re-Cross-Examination by Mr. Bovee:

434 RXQ. Mr. Parsons, have you given the conversation between you and Mr. Coudert, the entire conversation between you and Mr. Coudert with reference to the settlement?

A. I do not remember that I have been asked to do so.

435 RXQ. I ask you to give as nearly as you can recall the entire conversation between you and Mr. Coudert at that time?

F. 1033 A. According to my present recollection there was very little conversation. Mr. Coudert knew what had transpired upon the probate contest; so did I. I have no recollection that any reference was made to it. So far as I recall, something was said in general conversation between Mr. Coudert and me about the character of the contest, that there ought not to be such a contest, that some enlarged provision ought to be made for Mrs. Fayerweather, and that Miss Joyce, now Mrs. Reynolds, should be relieved from the provision about her marriage, and that something should be done for Mrs. Emma S. Fayerweather and Mrs. Achter. I think the question arose, how much, what; and so far as my memory serves me any conversation between Mr. Coudert and

F. 1033 me simply related to amounts. I think that originally some lesser amount was mentioned; and what leads me to think that there must have been more than one conversation is, that I am confident that in the first conversation the amounts were not fixed; I think that Mr. Coudert said something to the effect that he desired to consult. And in what I should state was the second conversation the amounts were fixed; and I think that is about all that occurred. I am very confident that we did not discuss legal questions or consider anything other than the fact that there was to be a settlement, and what was suitable to be paid.

Mr. Bovee: That is all.

By Mr. Sherman:

436 RDQ. Before you wrote the letter at page 430 of the Five College Record there had been a very general newspaper discussion of the residuary clause of this will and a very general criticism of Mr. Ritch and of the other executors in the newspapers, had there not?

A. Not to my knowledge.

437 RDQ. Then will you kindly state to what yon refer when you say in that letter of February 14th,
F. 1035 1891, "The charge having been made that Messrs. Bulkley, Ritch and Vaughan proposed to retain for their personal purposes Mr. Fayerweather's residuary estate," where and by whom had that charge been made at that time, and in what terms, if you remember?

A. Mr. Coudert, time and again up to that date, had claimed, as a reason why these papers should not be admitted to probate that Mr. Ritch particularly and Mr. Vaughan, I am not so sure about Mr. Bulkley except as he was one of the three, had procured themselves to be written down heirs for personal purposes, and that Mr. Fayerweather's will and codicils should not be admitted to probate, that being the reason.

438 RDQ. Is that the sole foundation for your
F. 1036 statement in the letter of February 14th, and is it to that alone you refer when you say, "The charge having been made that Messrs. Bulkley, Ritch and Vaughan proposed to retain for their personal purposes Mr. Fayerweather's residuary estate."

A. It may be that what Mr. Coudert claimed before the Surrogate got into the newspapers, and if that is so, the origin of it is the contention of Mrs. Fayerweather, co-operated in by Judge Rollins, on the probate contest.

Mr. Sherman: Mr. Parsons, will you indicate some time when it will be convenient to you to look over your deposition and sign it? I should like to attend at the time.

Mr. Parsons: The probability is that as soon as I am furnished with it complete, if it is necessary that I shall look it over before signing it, I shall do so. I did not know that it was necessary that I should sign it.

The Examiner: There may be some alterations that you want to make.

Mr. Parsons: I will conform to that practice as soon as I am furnished with the minutes.

At this point a recess was taken until 2 p. m.

F. 1037

After recess.

Adjourned to December 6th. 1901, at 10:30 a. m.

NEW YORK, February 6th, 1901.

Met pursuant to adjournment. *Present:* The Examiner, Mr. Sherman, Mr. Blaikie, Mr. Bovee, Mr. Carnochan, Mr. McLoughlin, Mr. Stimson, a representative of Nash & Jones, and a representative of Russell &

F. 1038 Holmes.

Mr. Sherman: Counsel for the complainants inquires of counsel for the defendants whether they have now noted all the objections they desire to the deposition of Dr. John A. Irwin.

Mr. Bovee: They have not. The examination of Dr. Irwin was interrupted, as you will remember, by other matters, and it has never been concluded.

Mr. Sherman: Shall we go on with that now?

Mr. Bovee: Yes.

Defendants object to question 41 as improper in form and leading and irrelevant, and immaterial to the issues

presented upon the special pleas, and incompetent as calling for the opinion and conclusion of the witness and not facts.

The same objection to question 44.

Defendants object to question 46 as irrelevant and immaterial to the issues presented upon the special pleas, incompetent and calling for the opinion and conclusion of the witness.

The same objection to question 47.

The same objection to question 48.

F. 1039 Defendants object to question 49 as irrelevant and immaterial to the issues presented on the special pleas, incompetent, calling for the opinion of the witness and not for facts, and on the further ground that the relation between the witness and Mrs. Fayerweather was physician and patient.

The same objection to question 50, which is a continuation of question 49, and part of the same apparently.

The same objection to question 51.

Defendants object to question 52 as irrelevant and immaterial to the issues presented upon the special pleas, incompetent, calling for the opinion and conclusion of the witness and not for a fact and a violation of Section 834 of the Code of Civil Procedure of the State

F. 1040 New York, as the relations between the witness and Mrs. Fayerweather were those of physician and patient.

The same objection to question 53.

The same objection to question 54.

Defendants object to question 55 as irrelevant and immaterial to the issues presented upon the special pleas, as incompetent and calling for the opinion of the witness and not for a fact, and his conclusion, and a violation of Section 834 of the Code of Civil Procedure. Defendants move to strike out the answer of the witness upon the same grounds, and on the ground that it is not responsive to the question.

Defendants object to question 56 as improper in form and leading, irrelevant and immaterial to the issues presented upon the special pleas, incompetent, calling for the opinion of the witness and not for facts; and they move to strike out the answer of the witness upon the same grounds and upon the further ground that it is not responsive to the question.

Defendants object to question 57 as objectionable in form and leading, and as irrelevant and immaterial to the issues presented upon the special pleas, and in-
F. 1041 competent, and calling for the conclusion of the witness and his opinion.

Defendants object to question 58 as irrelevant and immaterial to the issues presented upon the special pleas.

Defendants move to strike out the answer to question 59 as irrelevant and immaterial to the issues presented by the special pleas, and as not responsive to the question.

Mr. Bovee: Mr. Sherman, was Dr. Irwin recalled?

Mr. Sherman: I have no recollection of it. I can only tell you by looking at the Hamilton record. Have you not got it complete there?

Mr. Bovee: I do not know whether it is complete or not, I cannot say, I have never had it compared.

Mr. Sherman: I think the index is correct and
F. 1042 I think that will show. I cannot say from memory, that was some time ago.

Mr. Bovee: I do not find any reference to his being recalled here. I do not think he was.

Mr. Sherman: Is that the original deposition?

Mr. Bovee: No, it is not the original deposition; it is what purports to be a printed copy of it in the Hamilton College record. Defendants now move to strike out the entire testimony of Dr. Irwin on the ground that it is not within the issues raised by the plea and replication, and on the ground that it is not within the issues at large in the case, and as irrelevant, immaterial and incompetent.

TESTIMONY OF J. E. PARSONS.

Mr. Sherman: Counsel for the complainants inquires of counsel for the defendants whether he desires to cross-examine the witness, John A. Irwin.

Mr. Bovee: Defendants expect to cross-examine Dr. Irwin.

Mr. Sherman: Counsel for complainants notifies the counsel for the defendants that he will produce Dr. John A. Irwin at this place to-day, at half past two, for cross-examination.

F. 1043

CHARLES H. TRUAX, called as a witness on behalf of the complainant, being duly sworn, testified as follows:

Direct examination by Mr. Sherman:

1 Q. You are a Justice of the Supreme Court of the State of New York?

A. Yes.

F. 1044 2 Q. And you were such Justice in December, 1894?

A. Yes.

3 Q. Did you hold the Special Term of that Court at which was tried the action entitled The Trustees of Amherst College and others against Thomas G. Ritch and others?

A. Yes.

4 Q. In your opinion in that case at page 1004 of the record of the Court of Appeals you used this language: "The view that I have taken of the facts and the law of this case renders it unnecessary for me to consider the very interesting questions of law propounded by the

learned counsel for the defendants, Reynolds, Achter and Fayerweather." Is that language in the opinion intended to express the idea that you did not consider and decide either the law or the facts in relation to the validity of the releases?

Mr. Bovee: The defendants object on the ground that it is irrelevant and immaterial to the issues presented upon the special pleas, as incompetent, and the opinion filed by Justice Traux is the best evidence of what that opinion contains and what the learned Justice
F. 1045 intended, and calling for the opinion and conclusion of the witnessas to matters which are matters of record.

A. I think that that should be the view above, or the view stated above that I had taken. Wont you repeat the question?

(Question No. 4 repeated by stenographer.)

The Witness: I can tell you what I did mean by that.

5 Q. If you please.

Mr. Bovee: And we make the same objection to Judge Truax stating what he meant.

F. 1046 A. I can tell you what my present recollection is of what I did then means.

Mr. Bovee: To that we object.

The Witness: As I remember now the heirs, Reynolds and Achter and Fayerweather, sought to set aside certain releases upon the ground that those releases had been obtained from them by fraud or deceit, and one of the principal claims that they made, one of the principal evidences of fraud, was the gross inadequacy of the consideration. Under my view of the law they got $310,000 for nothing. They did not have anything to release, and not having anything to release they got more than they were entitled to, when they got

the $310,000, so it was unnecessary for me to consider, as I thought, any of the questions propounded by them.

6 Q. The theory upon which the decision proceeds is, is it not that the claim set up in the complaint by the Five Colleges as to a secret trust, independent of a testamentary paper, was sustained by the evidence and was a valid trust in law as against the Statute of Wills, and that therefore no title ever passed from Mr. Fayerweather in such a way as either to vest in the widow or next of kin or to be divested by their releases?

F. 1047 Mr. Bovee: Same objection.

A. I thought they had no interest in the estate.

7 Q. And for the reasons embodied in the question substantially?

Mr. Bovee: Same objection.

A. For the reasons that I have stated, because it went either under the deed of trust or the will to somebody else, that is, part of it went under the will and another part of it went under the secret agreement or the secret trust.

8 Q. That part of it which went under the residuary clause of the will, was that regarded as a testamentary disposition of it in view of the evidence of a trust

F. 1048 created by Mr. Fayerweather in his lifetime?

Mr. Bovee: Same objection.

A. I do not remember.

Mr. Sherman: I think that is all.

The Witness? Now mind you, I have not looked over that case in six years — four years last fall. It may be that my recollection is not perfect of all the facts in the case.

Mr. Bovee: Judge, I am sorry that I shall have to ask you to come back if we desire to ask you any questions. I was not in the case before you and Mr. Parsons was. He is now trying a case in the State Court before Judge Laventritt and is unavoidably absent to-day, and he is

so familiar with that record I should prefer that he should ask any questions that are put to you upon cross-examination.

The Witness: All right, any time. I wish that you would call my attention to the record.

Mr. Sherman: I do not think there is anything in the record that would vary one iota what your Honor has said, I think you remember it perfectly. I should be pleased to see anything in the record that would militate against what the Judge has just said; I have

F. 1049 not discovered it.

The Witness: The fact of it is that I did not say anything in my opinion about these releases, and my recollection is that I did not say anything because I did not consider it necessary.

9 Q. There is no reference in the decision, the formal decision, to the releases. Was there stated in the formal decision all the facts found by you which you considered essential to the judgment to be entered?

Mr. Bovee: We object to that.

A. I do not remember, I did not draw the formal decision.

Mr. Stimson: It was one of the short decisions anyhow.

F. 1050

Cross-examination by Mr. Bovee:

10 AQ. Judge, do you remember that Colonel James was present and participated in that trial?

A. Yes.

11 XQ. Representing the executor of Mrs. Fayerweather and the nieces of Mr. Fayerweather?

A. Yes.

12 xQ. The trial occupied several days, did it not? Is that your recollection?

A. Yes.

13 XQ. Fully participated in by Colonel James and Mr. Blaikie as counsel for those parties?

A. Yes.

14 XQ. Every opportunity afforded them of introducing whatever evidence they had to present?

Mr. Sherman: That is objected to on the ground that the record is the best evidence.

A. Every opportunity was given to them to try to introduce it. Sometimes there were objections taken you know, that is there may have been, I do not
F. 1051 remember now. I know that they were quite active, both Mr. Blaikie and Colonel James.

15 XQ. Do you recall what occurred when the decision was finally settled, the form of decision?

A. I recall the fact of the settlement. I think Mr. Blaikie was there and I think Colonel James was there.

16 xQ. Counsel for other parties, representing others, were there?

A. Oh, there was a big crowd of them there. Altogether there were some twenty or twenty-five lawyers.

Mr. Bovee: Further cross-examination is suspended.

Signed,

F. 1052

CHAS. H. TRUAX.

Signed and sworn to before me, the 14th day of February, 1901.

JOHN A. SHIELDS,
Examiner.

Counsel for defendants state that the have no further cross-examination.

At this point a recess was taken until 2 P. M.

TESTIMONY OF DR. JOHN A. IRWIN.

AFTER RECESS

Mr. Sherman: I tender the witness, Dr. John A. Irwin, for cross-examination.

Mr. Bovee: Counsel for defendants states that he will proceed with the cross-examination of the witness Irwin, but that the defendant Hamilton College, while standing upon the objections taken to the testimony of
F. 1053 the witness, declines to cross-examine said witness on the ground that his testimony is irrelevant and immaterial to any of the issues raised by the cross bill, and furthermore moves to strike out the whole of the testimony upon that ground.

Counsel for defendants protest against being compelled to cross-examine on matters which are irrelevant to the issues raised by the special pleas, and in cross-examining the witness they do not waive their objection that such matter is irrelevant and immaterial. They make cross-examination and insist that it is in the nature of a *de bene esse* examination conditioned on the Court holding that the direct examination of the witness is relevant and material.

F. 1054 Before proceeding with the cross-examination they repeat the tender of the stipulation to strip the case of all irrelevant matter, meaning by that matter which is relevant to the only issue which they understand to be before the Court, that of estoppel by the judgment in the case of Amherst College and others against Ritch, which they have pleaded in bar. And before proceeding with cross-examination defendants move upon the record to strike out all the testimony of the witness as irrelevant and immaterial.

Mr. Sherman: Counsel for the complainants do not assent to the qualifications stated by counsel for the defendants as to the effect of the cross-examination, but

insists that that effect shall be determined in accordance with the rules of law.

DR. JOHN A. IRWIN, re-called for cross examination, testified as follows:

Cross examination by Mr. Bovee:

61 xQ. Doctor, when did you give your testimony as to which I am now called upon to cross examine you?

A. I do not remember the date, sir.

62 xQ. Do you remember the year?

F. 1055 A. Approximately.

63 xQ. What year was it?

A. Well, I prefer not to guess, sir, I do not remember the date; I can tell about it, it is in my books.

64 xQ. I simply want to know, Doctor, whether you remember when it was that you testified in this case?

A. I have testified on more than one occasion in this case, sir.

65 xQ. More than one occasion in this case?

A. In the general litigation, sir, which I speak of as this case.

66 xQ. How many times have you testified in this case?

F. 1056 A. Two or three times, sir.

67 xQ. Are you not able to state more specifically than that?

A. Twice I think.

68 xQ. When did you last testify in this case?

A. In this room, sir. I have already stated I do not remember the date exactly.

69 xQ. Do I understand you to say that you cannot remember the year in which you last testified?

A. I may refresh my memory I presume.

70 xQ. If it is impossible for you to tell without refreshing your recollection.

A. I have a great many things in my mind, sir, and I do not carry these things.

71 XQ. Is it impossible to tell me when you testified here except by refreshing your memory from memoranda?

A. (Referring to memoranda.) January, 1899.

72 XQ. From what have you refreshed your recollection from which you now testify?

A. This document, sir.

73 XQ. The testimony which you gave before?

A. Yes, sir.

F. 1057 XQ. A printed copy of the testimony which you gave on the last examination?

A. Yes, sir.

75 XQ. That was furnished you by the counsel for the complainants?

A. I suppose so, sir.

76 XQ. When?

A. I do not remember, sir, soon after that testimony was given, I believe.

77 XQ. Soon after the testimony was given?

A. So I believe.

78 XQ. Can you tell me when it was that you received that testimony which you drew from your pocket a moment ago?

F. 1058 A. I can tell you that it is many months since I received it.

79 XQ. Many months?

A. Yes, sir.

80 XQ. When did you say it was that you gave that testimony?

A. In January, 1899.

81 XQ. From whom did you receive that paper, Doctor?

A. I received it by mail, I think, sir.

82 XQ. Do you know from whom it came?

A. Not with certainty.

83 XQ. Sir?

A. Not with certainty.

84 XQ. You had an opinion about it, I fancy?

A. Probably.

85 XQ. Whom did you suppose it came from?

Mr. Sherman: Objected to as incompetent and immaterial.

Mr. Bovee: Be kind enough to answer.

The Witness: Do I answer?

Mr. Sherman: Yes.

A. I presume it came from some one connected
F. 1059 with the complainants in this case, as I understand it.

86 XQ. Can you tell me which person?

Mr. Sherman: Same objection.

A. Probably from Mrs. or Mr. Reynolds.

87 XQ. From Mr. or Mrs. Reynolds. Was there no letter accompanying the paper?

A. Not that I remember, sir.

88 XQ. Will you swear that there was not?

A. I do not care to swear to anything I am not sure of.

89 XQ. Did it come to you by mail?

A. That is my recollection.

90 XQ. You have not retained the envelope
F. 1060 in which it came?

A. No, sir.

91 XQ. Do you recall whether the envelope had on its back anything to indicate the source from which it had been sent?

A. I recall nothing upon the subject.

92 XQ. Or whose office?

A. The matter was not sufficiently important to impress itself on my memory.

93 XQ. You have examined that paper recently, I presume?

A. Yes, sir; I have read it to-day.

94 XQ. With a view to refreshing your recollection for this testimony, I suppose?

Mr. Sherman: Objected to as immaterial.

(At the request of the witness Question No. 94 was repeated by stenographer.)

A. With a view to refreshing my recollection clearly.

95 XQ. What was the other occasion on which
F. 1061 you testified in this case, and when was that?

A. I think it was the Supreme Court or Superior Court, in the Court House, before Judge Truax.

96 XQ. That was the case of Amherst College and others against Ritch, was it not?

A. I am sure I don't know, sir.

97 XQ. Can you tell me in what year that was?

A. No, sir.

98 XQ. I understand you to say that your best recollection is that it was in the Fayerweather case tried by Judge Truax, is that right?

A. Yes, sir.

99 XQ. And that that was in the Supreme Court?

A. That is my impression; I have no positive
F. 1062 information on the subject.

100 XQ. In that action you were called by the defendant, John B. Reynolds, were you not, and Mrs. Fayerweather and Mrs. Achter?

Mr. Sherman: Objected to on the ground that the record is the best evidence.

A. I have no positive information of any of the technical points connected with the case, sir; but I was asked to go there and testify, and I was put upon the stand and examined. These are the only facts that I am prepared to swear to.

101 xQ. You were examined upon the direct by Colonel James?

A. I do not understand your legal technicalities.

102 xQ. You were examined first by Colonel James, were you not?

A. Yes.

103 xQ. That, Doctor, is what we call direct.

A. I am thankful for the information, sir.

104 xQ. Or in chief.

A. Yes.

105 xQ. And you were cross examined, were
F. 1063 you not, by Mr. John E. Parsons?

A. Yes, sir.

106 xQ. Colonel James in that proceeding was the counsel for Mr. John B. Reynolds as executor of Mrs. Fayerweather and for the defendants Emma S. Fayerweather and Mrs. Achter, was he not?

Mr. Sherman: Objected to on the ground that the record is the best evidence.

A. I really am not competent to testify upon that subject at all, sir. I had no information directly and took no more interest than my position in the case.

107 xQ. You did understand, did you not, that Colonel James, by whom you were examined, represented Mr. Reynolds?

F. 1062 A. I am not aware that he represented Mr. Reynolds particularly in the case, sir.

108 xQ. Don't you know that you were called by Colonel James?

A. Yes.

109 xQ. Had you been subpœnaed in the case?

Mr. Sherman: Objected to as immaterial, as not cross-examination, as evidence at large in the cause.

A. I do not think the legal subpœna was served upon me.

110 xQ. Then you went to Court by request?

A. I do not remember at this date—naturally by request I should not have gone there otherwise.

111 xQ. And that was the request of Mr. John B. Reynolds, was it not?

A. I do not remember at all, sir.

112 xQ. You know that you were not requested to go there by the executors of Mr. Daniel B. Fayerweather, do you not?

A. I do not think they cared to see me, sir.

113 xQ. How is that?

A. I do not think they would desire to see me.

114 xQ. And it is your recollection, is it not, F. 1063 that they did not ask you to go to Court to give testimony in that case?

A. I am positive, certain, that they did not.

115 xQ. And as a matter of fact, Doctor, your best recollection is that the suggestion for you to go to Court in that case to give testimony came either from Mr. Reynolds or his wife, or Mrs. Emma S. Fayerweather or Mrs. Achter, one of those four?

A. It may have come from their counsel, sir, it came from somebody connected with the case.

116 xQ. Or I will say their attorney, Mr. Blaikie, or their counsel Mr. James?

A. Probably one of those enumerated persons.

117 xQ. Now that is the only other occasion on F. 1064 which you have given testimony, is that so?

A. Yes.

118 xQ. You did not testify in the Surrogate's Court?

A. No.

119 xQ. On the contest over the probate of the will and codicils of Mr. Fayerweather?

A. No.

120 xQ. But you were in Court on several occasions?

A. On several occasions.

121 xQ. Pending that contest?

A. Yes, sir.

121 xQ. And you were in constant communication with Mrs. Fayerweather from that period of time?

A. I was in constant professional attendance upon Mrs. Fayerweather during that time.

123 xQ. Did you know at that time Mr. Daniel J. Holden?

A. Yes.

124 xQ. You saw him in Court?

A. I am not prepared to testify to the facts.

125 xQ. During the will contest?

A. I believe so, but I am not prepared to testify.

126 xQ. Did you not see him at Mrs. Fayer-
F. 1067 weather's house?

A. Yes.

127 xQ. He was one of the counsel for Mrs. Fayerweather upon the probate contest, was he not?

A. I think so.

128 xQ. You know him as an associate of Mr. Frederick R. Coudert?

A. By repute, sir.

129 xQ. Are you able to tell me, Doctor, on how many occasions you saw Mr. Holden at Mrs. Fayerweather's house during that will contest?

Mr. Sherman: Objected to as not cross-examiuation, either *de bene esse* or other, as not relating to any matter
inquired of in chief, as evidence at large in the
F. 1068 cause.

(At the request of the witness Question 129 was repeated by the stenographer.)

A. No, sir.

130 xQ. Doctor, upon the trial before Judge Truax to which you have referred, were you not asked this question by Colonel James, and did you not give this answer; and before answering the question I will ask you to look at the record in the case of Amherst against Rich in order that you may refresh your recollection if you desire: "Well, tell me what the facts were, was she out of

doors?" referring to Mrs. Fayerweather. "A. She was out of doors every day except on some days; as a rule she was out of doors on fine days; she was nervous and irritable, but mentally she was perfectly clear."

(Book handed witness.)

Mr. Sherman: Objected to upon the ground that any use by the defendants of the record in the Five College action except what is essential to show what was
F. 1069 decided by that record, is evidence at large in the cause, in which category the present inquiry comes; and on the further ground that it is not cross-examination.

A. If this is, as I presume, a true report of the examination there I presume that this is my answer. In saying that she was mentally perfectly clear, I intended to imply that she was not insane.

131 xQ. And you did so testify there as shown by that?

A. Simply on the fact that you present it to me, sir, I assume that I did. I have no recollection of it which would enable me to swear that I did.

132 xQ. Your recollection, Doctor, in 1894, when you testified in that case, was quite as good as to
F. 1070 Mrs. Fayerweather's condition as it is now, was it not?

A. Probably, sir, I presume better; our memory does not improve by keeping.

132 xQ. You are a man of pretty good memory I fancy, Doctor?

A. In certain directions, sir. I am a man of strong recollections but poor memory.

134 xQ. (Handing book) I again show you the record of the testimony in Amherst against Ritch, Doctor, and ask you if you were not asked this question and if you did not give this answer: "Q. I want to know whether, commencing with the determination of Mrs. Fayer-

weather to engage in a contest before the Surrogate and continuing on, her disease did not become aggravated?

A. Her disease was aggravated about the time of Mr. Fayerweather's death and subsequently, and was very much aggravated about that period." Did you not so testify upon that trial?

Mr. Sherman: Complainants make the same objection which they did to the last question embodying a reference to this record.

A. Well, sir, I would answer it as your former
F. 1071 question, that assuming that report to be correct, I did so testify.

135 xQ. That testimony was true, was it?

A. Yes.

136 xQ. Were you not asked this question, and did you not give this answer: "Q. I mean about the period of the beginning of the contest? A. Yes, sir." Did you so testify?

Mr. Sherman: Same objections.

A. Under the same reservations, yes.

137 xQ. And that testimony was true?

A. Yes.

140 xQ. Did you not upon that same trial, in answer to the question of Colonel James give this testimony,
F. 1072 if you will follow me: "I remember that after the settlement had been arrived at her condition improved very rapidly but until that time her condition was exceedingly unfavorable." Did you not so testify?

Mr. Sherman: Same objections.

A. Yes.

141 xQ. And that testimony was true, was it not?

A. True to the best of my recollection.

142 xQ. Following that testimony were you not asked this question by the Court Judge Truax: "Q. The settlement was a good thing for her?" and did you not answer "It was a good thing for her, yes, sir.

Mr. Sherman: Same objection.

A. Meaning for her health.

143 xQ. No, did you so testify, Doctor.

A. If the record says so; but I cannot testify that that record is correct.

144 xQ. That testimony was true, was it not, if given by you?

A. With the meaning that it was a good thing for her health, naturally so.

145 xQ. Was that in the sense in which the tes-
F. 1073 timony was given there you were correct in stating it was a good thing for her, I refer to her health, Doctor?

Mr. Sherman: Same objections.

A. If you refer strictly to her health, the settlement was a good thing for her.

146 xQ. And in that sense the testimony given by you on that occasion in answer to the inquiry by Judge Truax was true?

Mr. Sherman: Same objections.

A. Any testimony I have given, sir, is true.

147 xQ. Doctor, were you asked this question and did you give this answer upon that same trial before Judge Truax: "By Mr. James: Q. And when you say
F. 1074 she went out do you mean that she drove out or walked out?

A. I mean that she drove out; she took a short drive inher own carriage."

Mr. Sherman: Same objections.

A. Yes, sir.

148 xQ. You did so testify?

A. So I assume from this document, sir.

149 xQ. And that testimony was true, it was the fact?

A. Yes.

150 xQ. Did I understand you to say that you saw Mr. Holden in the Court room, in the Surrogate's court room during the will contest on occasions while you were there?

Mr. Sherman: Objected to as not cross-examination, but evidence at large in the cause.

A. I believe that I saw him, but I would not testify to it at this late date.

151 xQ. Do you recall that Mr. Holden had anything to do with the drawing and execution of the will of Mrs. Fayerweather?

A. Yes.

152 xQ. It was drawn by him?

Mr. Sherman: Objected to as evidence at large
F. 1075 in the cause.

A. I do not know whether it was drawn by him but it was brought by him to Mrs. Fayerweather's house.

153 xQ. And the execution of the paper supervised by him as her attorney?

Mr. Sherman: Same objection.

A. Yes.

154 xQ. Do you remember when that was, Doctor?

Mr. Sherman: Same objection.

A. Not accurately.

155 xQ. Were you present at the time?

A. Yes.

156 xQ. Were you a witness?

A. Yes.

F. 1076 157 xQ. Are you able to tell me who was present at the execution of that paper?

Mr. Sherman: Objected to as evidence at large in the cause as immaterial and because the probate of Mrs. Fayerweather's will cannot be attacked collaterally.

Mr. Bovee: There is no such thing in contemplation.

Mr. Sherman: It is pretty hard to say what is in contemplation from this line of examination.

Mr. Bovee: In view of the example which has been set by the counsel on the other side, it is pretty difficult to say what is in contemplation.

Mr. Sherman. I will take the precaution of taking the objection.

(At the request of the witness, Question No. 157 was repeated by stenographer.)

A. Not with certainty.

158 xQ. Do you know how long after the death of Mr. Fayerweather that was?

Mr. Sherman: Same objections.

A. Within probably two months.

159 xQ. After the death of Mr. Fayerweather?

F. 1077 A. That is my impression.

160 xQ. After the 15th of November, 1890;

A. Well, I would not say positively two months, but it was within six months I can say positively.

161 xQ. Doctor, is your recollection of the matters to which you have testified as good to-day as it was in 1899 when you gave your testimony in chief in this case in this room?

A. I think, sir, it is an established scientific fact that memory is not like port wine, it does not improve by keeping; but my memory is sufficiently accurate to make a true statement on the same matters on which I then testified.

162 xQ. When did you last see Mr. Fayer-

F. 1078 weather?

A. The date is mentioned in the testimony, as I had before coming to testify here on the last occasion, I had looked up my book; I have not done so since then. The exact date is stated in the former testimony. It was about two weeks, a week perhaps before Mr. Fayerweather's death. He sent for me on that occasion and I saw him at his request.

163 xQ. Is that the best answer that you can give to my question, doctor?

A. I would like, sir, to give an answer more to your taste, but that is the best. If you will allow me to look at the testimony I can state positively that what was stated then was true.

164 xQ. You have the testimony in your pocket, have you not? A. Yes, sir.

165 xQ. Do I understand you to say that without reference to the testimony given by you in March, 1899, you cannot tell me when you last saw Mr. Fayerweather alive?

A. Positively not, sir.

166 xQ. Positively not?

A. I see a great many patients every day and I do not carry in my mind the dates at which I see them.

167 xQ. Now I will ask you to refer to that tes-
F. 1079 timony and tell me when it was, if you can, that you last saw Mr. Fayerweather?

A. (Referring to paper.) It was on the 6th of October, 1890.

168 xQ. Do I understand you to say that you testified to that fact after consulting your book? A. That is my recollection, sir.

169 xQ. Were you examined upon that subject in the trial before Judge Truax, Doctor?

A. Upon what subject, sir?

170 xQ. As to when you saw Mr. Fayerweather?

A. That I do not remember.

171 xQ. Were you not asked this question and did you not testify in that case as follows: "Q. Did you
F. 1080 see Mr. Fayerweather during his last illness, I mean during the month of November, 1890, preceding his death? A. Yes, I saw him about the 1st of November, I think."

A. I presume I had not referred to my book before making that answer.

172 xQ. But you did so testify upon that trial as shown by that record?

A. It is shown by the record, sir, but I cannot testify that the record is correct.

173 xQ. And in view of your subsequent testimony and your subsequent investigation, if you did so testify that you saw him about the 1st of November, you were in error?

A. I presume so.

174 xQ. Doctor, who were the members of Mrs. Fayerweather's household during the contest in the Surrogate's Court over the probate of the wills and codicils of Mr. Fayerweather? A. Who were the—

175 xQ. Members of her household?

A. I am not prepared, sir, to testify to that question. I can testify as to whom I saw in her household; but I was not a member of her household myself, and I do not know who were staying at her house or
F. 1081 who visited her house; I cannot testify on that point.

176 xQ. Well, who did you see there?

A. So many people, sir, that I am not prepared to name them all.

177 xQ. Can yon name any! A. Yes.

178 xQ. Will you be kind enough to do so?

A. I saw, so far as I can remember at this long distance of time, Judge Beardsley, of Bridgeport, Mrs. Beardsley, Miss Joyce, another Miss Joyce, Miss ———, I do not recall her Christian name, and several other persons.

179 xQ. Are you able to say who those other persons were?

F. 1082 A. No, sir; I do not take notice of such matters very particularly.

180 xQ. When you say Judge Beardsley, you mean the brother-in-law of Mrs. Fayerweather, do you not?

A. I do not think that was his relationship to Mrs. Fayerweather, sir. I think he married—

181 xQ. You mean the husband of Mrs. Fayerweather's niece?

A. Of Mr. Fayerweather's niece, I think so.

182 xQ. Mr. Fayerweather's niece?

A. I think so.

183 xQ. Do you know from what Judge Beardsley got his title? A. Of Judge?

184 xQ. Yes.

Mr. Sherman: Objected to as immaterial and not cross-examination and evidence at large in the cause.

A. I have no positive information, but I understand he was the Judge of a Surrogate's Court in Connecticut.

185 xQ. Do you know the lady who sits to your left upon the sofa, at the end of the seat, Doctor?

A. Yes.

186 xQ. Mrs. Emma S. Fayerweather, is it
F. 1083 not? A. Yes.

187 xQ. Did you see her at Mrs. Fayerweather's house at that time?

A. Not that I remember. My visits to Mrs. Fayerweather's house were mostly, almost exclusively professional visits; I was not introduced to the persons who happened to be there in every instance without some object. I may have seen her.

188 xQ. You will not swear that you did not see her?

A. I cannot swear that I did not see anyone else there. A physician visiting a house, there are very often pesons sitting in the room to whom he is not presented, nor does he look at them with a view of identifying them.

F. 1084 189 xQ. Is it not your best recollection that you did see that lady at that house at that time or another?

A. I have absolutely no recollection upon the subject.

190 xQ. None whatever? A. No.

191 xQ. Are you able to say approximately on how many occasions you saw Judge Beardsley there?

Mr. Sherman: Objected to as evidence at large in the cause, as not cross-examination, as not to be embraced within any provisional cross-examination.

(At the request of the witness Question No. 191 was repeated by stenographer.

A. No.

192 xQ. Pending the will contest, I am speaking about that period?

Mr. Sherman: Same objections.

A. No.

193 xQ. Did you not see him from time to time talking with Mrs. Fayerweather?

Mr. Sherman: Same objection.

A. I have seen him talking with Mrs. Fayerweather unquestionably.

F. 1085 194 xQ. Had you been in the habit of going to the Fayerweather house prior to his death?

A. To Mr. Fayerweather's death?

195 xQ. Yes.

A. Certainly, for many years.

196 xQ. How often had you been in the habit of going to that house within, we will say, six months prior to his death?

A. I only went to his house in my professional capacity; and at that period, during that period, Mrs. Fayerweather was under my constant care, and I went to the house at such intervals as my professional necessity called for.

197 xQ. And you continued to visit the house F. 1086 same way after his death, did you?

A. Yes, sir.

198 xQ. Did you observe, doctor, any difference in the running of the house and the conduct of the household affairs after from what you had observed before the death of Mr. Fayerweather?

A. I had very little opportunity, sir, of judging such matters as my visits were professional visits.

199 xQ. Did you observe any difference?

A. I had no opportunity of observing anything excepting the furniture and effects which appeared to be the same.

200 xQ. And so far as the running of the house was

concerned it was the same was it not so far as you observed?

A. I had no knowledge, sir, I had no opportunity of making any observations upon the subject, sir.

201 xQ. Then you saw no change?

A. I could see no change when I saw nothing primarily; I could not have seen a change.

Mr. Bovee: I think that is all.

Mr. Sherman: I do not think of anything more that I care to trouble the doctor with.

F. 1087 JOHN A. IRWIN.

Sworn to befere me January 20, 1902.

JOHN A. SHIELDS,
Examiner.

Mr. Sherman: Complainants now offer in evidence the deposition of Anner Amelia Reynolds.

F. 1088

ANNER AMELIA REYNOLDS, called as a witness on behalf of the complainants, being duly sworn, testtified as follows:

Direct examination by Mr. Sherman:

1 Q. Mrs. Reynolds, you are the wife of John B. Reynolds? A. I am.

2 Q. I believe you were Mrs. Fayerweather's sister, were you not? A. Yes.

3 Q. The widow of Daniel B. Fayerweather?

A. Yes, sir.

4 Q. And did you for a number of years reside in Mr. Fayerweather's house at No. 11 East 57th street in New York City?

A. Yes, sir; upwards of twenty years.

5 Q. Your sister was an invalid for a long time before his death and her's?

A. Sixteen years.

6 Q. And did the cares and supervision of the household fall upon you?

F. 1089 A. Entirely.

7 Q. For how long before his death was Mr. Fayerweather afflicted with his fatal illness?

A. Four years.

8 Q. And during that time how much of it were you with him?

A. During all of the time.

9 Q. Was such attendance as was rendered to him done under your direct oversight and supervision, and by you sometimes?

A. Entirely; I was his only nurse.

10 Q. Do you know Thomas G. Ritch, one of the defendants here? A. I do.

11 Q. What relation in general did he bear to

F. 1090 Mr. Fayerweather towards the closing years of his life, wns he his legal adviser?

A. Yes.

12 Q. Was he in the habit of seeing Mr. Fayerweather frequently, so far as you know?

A. Well, sometimes quite frequently, and then there would be a long time that he would not see him.

13 Q. And did he ever come to the house to see him?

A. Yes, occasionally.

14 Q. Do you know Mr. Henry B. Vaughan, one of the defendants? A. Yes.

15 Q. How long, so far as you know, did his acquaintance with Mr. Fayerweather extend?

A. Well, really I don't know how long Mr. Fayerweather had known him; I knew Mr. Vaughan since about 1880, I think.

Mr. Granger: I ask to have the last part stricken out as not responsive, beginning with "I knew Mr. Vaughan."

Mr. Sherman: Counsel for complainants states that the existing stipulation being expressly based upon the deferring of objections in order to prevent the interruption of the deposition, the taking of such ob-

F. 1091 jections is by him regarded as a waiver of the stipulation, and he will at the final hearing insist that it has been waived.

Mr. Granger: I understood—I just came into the case a few days ago, Mr. Sherman, and I understood that all objections as to form had to be taken at the time. Was not that right?

Mr. Sherman: I have not heard you state anything about form.

Mr. Blaikie: I think that is right, Mr. Granger.

Mr. Granger: Then I will withdraw my objection.

Mr. Sherman: Strike it out then.

16 Q. And did Mr. Fayerweather know him before that?

F. 1092 A. Yes, he went to Europe with Mr. Fayerweather in 1875, I think.

17 Q. About a week before Mr. Fayerweather's death, did Mr. Fayerweather and Mr. Vaughan have an interview at Mr. Fayerweather's house which led to communications being made to Mr. Ritch on the subject of Mr. Fayerweather's then existing will and codicils, to your knowledge?

Mr. Granger: Objected to as to form.

A. Yes.

18 Q. State when that was and what you know of it?

A. It was a day or two before the 11th of November.

9 Q. 1890? A. 1890.

20 Q. As to what you know of it, tell all you know of it?

A. Mr. Vaughan came to the house to read to Mr. Fayerweather his will, and after reading it there was a great discussion between Mr. Fayerweather and Mr. Vaughan relating to the contents of the will.

21 Q. Before you get to that, at whose request did Mr. Vaughan read the will to Mr. Fayerweather?

A. Mr. Vaughan was sent for to come to the house to read the will, Mr. Fayerweather requested him.

22 Q. Through you?

F. 1093 A. Mr. Fayerweather requested me, in the early part of November, to write to Mr. Vaughan asking him to come to the house at his convenience.

23 Q. Were you Mr. Fayerweather's amanuensis at that time?

A. Yes, sir.

24 Q. You wrote his letters for him?

A. Yes, sir, I wrote all his letters.

25 Q. And were you in the habit of reading to him the letters addressed to him, which reached him?

A. Always.

26 Q. Was there anything about his hearing or eyesight which called for that, and if so, what?

A. Mr. Fayerweather's eyesight after he had

F. 1094 pneumonia was so impaired that he could not read at all; he could neither read the papers or letters or anything at all.

27 Q. From what time was that?

A. Four years before his death; and his hearing was also impaired, he grew quite deaf.

28 Q. Well, was it necessary to pitch your voice higher or increase the volume of it, or do anything out of the ordinhry in order to enable him to hear you, and if so, what?

A. I always sat quite near him and then I would enunciate very clearly in order to have him hear.

29 Q. And did you notice whether he watched the movements of your lips in order to enable him to hear you?

A. And he sometimes did that (illustrating).

30 Q. Put his hand up behind his ear?

A. Yes, sir, put his hand behind his ear.

31 Q. And under his direction you sent a communication to Mr. Vaughan to come and read his will to him?

A. I did.

32 Q. Where was the will at that time?

F. 1095 A. I had previously written to Mr. Ritch to bring the will to the house, and it was in an envelope in Mr. Fayerweather's pocket, hanging on the rack in his room.

33 Q. Were you present at the discussion between Mr. Fayerweather and Mr. Vaughan after the reading of the will?

A. A part of the time.

34 Q. Will you state what you heard them say each to the other.

A. I was in an adjoining room and I heard a great excitement between Mr. Fayerweather and Mr. Vaughan. Mr. Vaughan was trying to make Mr. Fayerweather understand the contents of his will, which he could

F. 1096 not bring to mind, could not make up his mind was so, and Mr. Vaughan said to him—this I heard distinctly as I came into the room—"If you were to die to-day, those two executors would get more than half your fortune;" and they had quite an argument about it, and some were no bills paid until after she signed the releases. Mr. very large strong talk.

35 Q. Well, I wish you would state everything that you heard on that subject, so far as you can recollect it.

A. And Mr. Vaughan said, "This man Ritch has written this, and he and Mr. Bulkley will come into possession of half your property, and I say this man, this Ritch, is a damned scoundrel."

36 Q. What response did Mr. Fayerweather make to that?

A. He thought that Mr. Vaughan was mistaken, that it could not be possible.

37 Q. What could not be possible? A. That this was so.

38 Q. That the will was so?

A. He said, "This is not the original will, I want to see the original will, and see if those statements are correct."

39 Q. In consequence of that, did you write
F. 1097 another letter to Mr. Ritch for Mr. Fayerweather?

A. Then I came into the room to hear this conversation, and as I retired, Mr. Vaughan called me and said: "I want you to come here a moment, because there is trouble over what Mr. Fayerweather has discovered in this will; I want you to write a note to Mr. Ritch and Mr. Fayerweather will sign it, you need not sign it." I came into the room and sat down by the side of the table opposite Mr. Fayerweather, and he dictated the note.

40 Q. Who dictated it?

A. Mr. Fayerweather, to Mr. Ritch, and I wrote it. Mr. Fayerweather signed it.

41 Q. (Handing book.) Please look at the pa-
F. 1098 per printed in the record in the Court of Appeals, which has been identified by the defendant, the Trustees of Hamilton College herein, at page 295, and marked Exhibit J, and state whether that is a correct copy of that letter?

A. That is it.

Mr. Sherman: I read it in evidence.

"11 East 57th Street,
November 13, 1890.

My Dear Mr. Ritch:

Will you please deliver to Mr. Henry B. Vaughan my original will and, and the first, second and third codicils

thereto, which have been kept in your possession, as I wish to examine them with him, in connection with the copies which you have furnished me.

Yours truly,

D. B. Fayerweather."

42 Q. What followed the writing of that letter, Mrs. Reynolds?

A. It was given to Mr. Vaughan.

43 Q. And did he return subsequently?

F. 1099 A. Is there a letter written previous to that, is there an exhibit of a letter written previous to that?

44 Q. By Mr. Vaughan? A. That was dated the 13th.

45. Q. Well, there is another letter of the same date; Did you write another letter on the same date?

A. Mr. Vaughan wrote a letter on the same date.

46 Q. For Mr. Fayerweather to sign?

A. For Mr. Fayerweather, not by Mr. Fayerweather's dictation, but he said he wrote the letter himself.

47 On this same occasion?

A. Yes, sir; on this same occasion.

48 Q. Look at the Exhibit K on page 297 of

F. 1100 the same record and state whether that is a correct copy of the latter letter?

A. I am not correct in my statements there, those letters were written after the codicil of the eleventh was executed, during another interview.

49 Q. Then you have made a mistake in the order of events? A. I have.

50 Q. Well, we will try to straighten that out?

A. Those are the two letters.

51 Q. Then on the occasion when Mr. Fayerweather got Mr. Vaughan to read the copy of his will, furnished by Mr. Ritch, after it had been read to him, what immediately followed, as you remember?

A. Mr. Fayerweather and Mr. Vaughan had quite a long interview, and I came into the room several times, getting very nervous, feeling he would be too tired. Mr. Vaughan told me what he had discovered in the will, something which reflected very much on Mr. Ritch, and there would have to be a new codicil made.

52 Q. Well, did he say that as coming from Mr. Fayerweather?

A. A. Yes, they agreed to that, and there was quite a consultation as to what lawyer should
F. 1101 be employed to write that codicil, it should not be a member of Arnoux, Ritch & Woodford's firm.

53 Q. What was finally decided?

A. Mr. Vaughan decided that as he termed it, his lawyer would be the one, that was Evarts, Choate & Beaman.

54 Q. And did Mr. Fayerweather agree to that?

A. He agreed to that.

55 Q. And then what happened in reference to that?

A. And asked me if I knew of any one in the neighborhood who knew Mr. Fayerweather sufficiently well to act as witness, that it would require three persons; and I said no, unless the two physicians,
F. 1102 Dr. Wilcox and Dr. Vedder; and then I suggested my niece, Miss Elizabeth Joyce, who was in the house. He said that would do.

56 Q. Was any draft or memorandum as to the contents which should be in the new codicil, prepared, so far as you know? A. Yes.

57 Q. State what the fact is in that respect, please?

A. They proceeded to make this draft, what Mr. Fayerweather wanted to do. It was drawn then and left at Mr. Fayerweather's house through mistake.

58 Q. What became of it, do you know?

A. Mr. Vaughan going away hurriedly, left the will, and this draft with the will in an envelope, in the

table drawer of the sitting room. The next morning he sent his son to Mr. Fayerweather's house with a note, asking me to deliver him that memorandum. I asked Mr. Fayerweather about it, and he said, "I do not know, but if you will open that table drawer, you will find an envelope with my will, you open that and examine the contents, and examine that and perhaps you will find it." I did. He asked me to read a portion of it to him for his identification, or he said, "Read it, and I will tell you if it is correct." I read a portion of it. He said,

F. 1103 "That is correct, you put that in an envelope, seal it and give it to Mr. Vaughan's son."

59 Q. Do you recall what it was you read?

A. I would rather not state, Mr. Sherman; if that is important, I could tell you, though.

60 Q. I think we had better take what you remember about it. Do you remember whose handwriting it was in?

A. It was in Mr. Vaughan's handwriting.

61 Q. And how many pages of it were there? Was it a single page or more?

A. It was on very long, legal paper.

62 Q. (Handing paper.) That is what we call legal cap?

F. 1104 A. It was on a longer paper than that, unless it was joined together, and it was names and figures.

63 Q. Do you remember any of the names?

A. Mrs. Fayerweather's name appeared first.

64 Q. Well, any others? A. My name.

65 Q. Any others! A. Three nieces.

66 Q. Any others?

A. Yes, but I cannot recall the names as they were, I know I read those names.

67 Q. Are there any other names that you can recall without taking them necessarily in the order in which they were there.

A. I heard several names called by Mr. Fayerweather to Mr. Vaughan when he was making out this list, as to who he wished to give to.

68 Q. What names were those?

A. One name was the wife of my brother, Mrs. Harriet Joyce. Another name that he asked was the Rev. William Lloyd.

69 Q. Was anything said by Mr. Fayerweather at the time the memorandum for his new codicil was being prepared, in regard to Mr. Ritch, and if so, what?

F. 1105 A. Well, after the first stormy attack on Mr. Ritch, I think Mr. Fayerweather said no more to Mr. Vaughan about him at that time; there was a great deal said that first day when the will was read.

70 Q. Well, was anything said by Mr. Fayerweather as to Mr. Ritch, you have testified, I think, as to something said by Mr. Vaughan to Mr. Fayerweather, now was there anything said at that interview by Mr. Fayerweather to Mr. Vaughan?

Mr. Blaikie: You mean at the stormy interview?

Mr. Sherman: Yes.

A. I do not think I could say in Mr. Fayerweather's language anything, although he said something to me afterwards, but not to Mr. Vaughan.

F. 1106 71 Q. When first after this interview at which Mr. Vaughan read to Mr. Fayerweather the copy of his will, did Mr. Fayerweather say anything in your hearing about Mr. Ritch, and what did he say? When first, the question is, and what did he say?

A. He said he had found something in his will which reflected very much upon Mr. Ritch's integrity. Previous to this when he had asked to see his will and I had objected, thinking it would disturb him, objecting to him having anything to do with his will because I supposed it was all right, he said, "I have heard lately of Mr. Ritch doing crooked things, and I do not want to find a mare's nest in my will," and immediately

after this he said to me, "I have found the mare's nest."

72 Q. On these previous occasions had any mention been made about Mr. Ritch, in connection with the Hoyt will by Mr. Fayerweather, and if so, what?

A. Well, when I asked him why he employed Mr. Ritch, he said because he had been Mr. Hoyt's lawyer, and they recommended him to him, and he had done some business for other gentlemen, and also for Mr. Vaughan, and that he made a serious blunder,

F. 1107 and he wanted to see if his will was all right.

73 Q. Well, had Mr. Fayerweather said anything in your hearing in reference to the contest over the Hoyt will?

A. No, sir.

74 Q. Well, this memorandum which was drawn by Mr. Vaughan, as you have testified, was followed by what action next, in reference to any will or codicil?

A. He took the memorandum down town and returned, and said that he would be at the house on the 11th, at 10 o'clock in the morning, to execute—to have the codicil executed.

75 Q. And did he come on the 11th?

A. And I engaged the doctors to come at that

F. 1108 time, but it was—they were not there at that time, it was delayed a little later, I could not tell you the exact hour, I should think possibly—there was a delay about it, anyway; it was executed on the 11th, but not at the hour first named.

76 Q. Were you in the house at the time the people arrived who took part in the execution of it?

A. Yes, sir.

77 Q. And who came first, if you remember?

A. The two doctors came about the same time.

78 Q. And then who came?

A. My niece was there, and Mr. Butler came in after I retired to the back room.

79 Q. Mr. Prescott Hall Butler?

A. Yes, I was not present, and I did not see him at all.

80 Q. Will you state the manner in which the front room on the second story of No. 11 East 57th street was furnished immediately prior to the arrival of Mr. Butler; to be more specific, how many tables were there in that room?

A. One large table in the centre of the room.

81 Q. Any other tables there?

F. 1109 A. Yes, two other tables, small tables filled with books.

82 Q. The large table in the middle of the room was about what size?

A. Well, that is pretty hard to tell.

83 Q. Well, with relation to this table, for instance, was it about as wide as this table?

A. It was a library table.

84 Q. Four feet by five and a half, or so?

A. I should think so.

85 Q. Was it a heavy solid table of some weight?

A. A solid table.

86 Q. Was it easy to move?

A. Very heavy.

F, 1110 87 Q. Was there a drawer in one end of it?

A. Two.

88 Q. Two drawers?

A. Yes, sir; two drawers, in either end.

89 Q. And was there anything in the room, on that table?

A. Yes.

90 Q. Was it in a drawer of that table that this envelope was placed, out of which you got the memorandum for Mr. Vaughan's son?

A. It was.

91 Q. How long after Mr. Butler departed were you in that room?

A. Immediately.

92 Q. Was there any change in the position of the furniture as between the time Mr. Butler came and the time he left? A. Not at all.

93 Q. Was there any appearance of the middle table having been used for writing purposes?

A. Well, it is always there for that purpose, it is kept almost entirely for the use of writing, the inkstand in the centre.

94 Q. How far from the front windows in that room is the table, as it then stood, I mean the table in
F. 1111 the centre, the writing table?

A. The centre of the room, and the room is 21x22 foot square.

95 Q. The 22 foot is the north and south direction, is it?

A. Yes, sir.

96 Q. And the table being in the middle, there would be something like 8 or 10 feet from the table to the front windows? A. Yes.

97 Q. Is it easy or difficult for persons speaking in an ordinary tone or pitch of voice at that table to be heard by persons at the front window?

A. Certainly you can hear distinctly if you are paying attention, if you care to hear.

98 Q. It would not then be a form of secrecy if
F. 1112 people were standing at that front window, discussing things in an ordinary tone of voice at the table?

A. There was no secrecy, and when Mr. Fayerweather had anything confidential in the house, he had the room closed and was by himself. The doors were all open and his family were invited to be within hearing distance.

99 Q. Do you mean on this particular occasion?

A. On this particular occasion, me, for instance, in case he felt badly, I knew what to do for him.

100 Q. Did you observe any change in Mr. Fayerweather's strength or physical condition following upon

the interview with Mr. Vaughan, and the execution of the codocil of November 11, and if so, what change did you observe?

A. He was very nervous and excited, and I was obliged to give him his nervines about twice as often as I had been in the habit of doing, to keep him quiet.

101 Q. When, prior to his death, did it strike you he was soon about to die, from his appearance?

A. I knew that he was failing very early Friday morning, but not until Friday night at midnight

F. 1113 did I become alarmed about his condition.

102 Q. And what occurred then to alarm you particularly?

A. He had been in the habit of lying flat, either on either side or on the back, with one small pillow, but I was obliged to put three or four pillows, very large pillows, in order to have him sit himself straight in bed, he could not get his breath, and I was obliged to open the window wide, and gave him constant attention, and became so alarmed that I was obliged to call his wife, I thought he was dying during the night, Friday night.

103 Q. When was the last occasion when he conversed with any freedom with those about him, how late prior to his death?

F. 1114 Friday.

104 Q. After that did he indicate his assent or dissent to what was said to him in any particular way?

A. He answered questions put to him until Saturday morning, well, Saturday noon, I should say.

105 Q. Well, by speaking or some other form?

A. By speaking.

106 Q. And after that?

A. And after that by a nod of the head.

107 Q. Judging from your acquaintance with him and your knowledge of his condition and his appearance, are

you able to form any judgment as to how late during his life he clearly understood what was said to him?

A. I read some letters to him on Friday evening about eight o'clock; I read two letters to him; he understood them and made some remark about them; one was from Mr. Ritch and one was from Mr. Vaughan.

108 Q. What did he say in reference to the letter from Mr. Ritch?

A. He remarked "Poor Ritch, he has gotten into trouble, but I will not see him."

F. 1115 109 Q. What had Mr. Fayerweather said prior to that time, if anything, in reference to his attitude or opinion of Mr. Ritch?

A. He had said from the time of reading that will to me repeatedly, "If that man comes here, don't let him upstairs, the sight of him would kill me." And I would quiet him, saying, "You shall not see him."

110 Q. Did Mr. Vaughan say anything on Saturday, in your hearing, in reference to the execution of a paper on that day by Mr. Fayerweather, and if so, what did he say?

A. Will you please read that question again?

111 Q. (Question repeated.) A. Mr. Vaughan was at the house on Saturday morning, Mr. Fayer-

F. 1116 weather had told me he would be there by appointment. I said to him, "I shall not let you see anyone to-day." He says, "If Mr. Vaughan comes here, I must see him." That was very early in the morning, before daylight. "I want you to give him that letter of Mr. Ritch," he had remembered reading it the night before. Mr. Vaughan came into the house as I was going out to go for the doctor. As he had not come at ten o'clock I became alarmed, and was going for him, in order to have a consultation that day.

112 Q. That is, you were going for the doctor?

A. For Dr. Vedder, to have him appoint a consultation with Dr. Janeway, and Mr. Vaughan came in as I

was going out the door, and I returned with him to Mr. Fayerweather's room, and I left Mr. Vaughan there. I went to the doctor's and told him my fears about Mr. Fayerweather, and when I returned Mr. Vaughan left the room. Dr. Vedder came back with me.

113 Q. Let me ask you just here, about what interval of time elapsed between your leaving Mr. Vaughan with Mr. Fayerweather and your return with the doctor, and finding Mr. Vaughan there?

A. I left the house at ten o'clock, it could not
F. 1117 have been more than half an hour, I waited for the doctor.

114 Q. At his house? A. At his house.

115 Q. And then came back with him?

A. I went for him with a coupe and then I came back with him.

116 Q. Now, what did Mr. Vaughan say then?

A. And Mr. Vaughan left the room, and the doctor examined Mr. Fayerweather, but at first asked him how he felt, and then directed all his remarks to me. He noticed the decided failure in Mr. Fayerweather, and he directed all his remarks to me; and when he was through with the examination, as he started to leave the room, he gave me a look that he wanted to speak to me.

F. 1118 117 Q. Who gave you a look?

A. Dr. Vedder, and I followed him, and he says, Mr. Fayerweather will not survive the day, if he lives until night I shall be surprised."

118 Q. Was Mr. Vaughan there at the time?

A. I said to the doctor, "Tell Mr. Vaughan." And he told me to be very careful in my manner, not to have Mr. Fayerweather at all suspect that I was alarmed; in that way, he said, I could take better care of him, and it would be better for the patient. He went into the front room and Mr. Vaughan was standing by the window in the room, and he told him, and Mr. Vaughan became very much excited, and said, "There is a paper

that has to be signed to-day;" and the doctor said, "It is very cruel." He spoke of it being an outrage to ask a man in his condition to sign any papers, and he said, "It must be a very important paper to ask a dying man to sign it," and Dr. Vedder was very excited. Mr. Vaughan says, "It's very important." And then he asked the doctor if they—he said, "Who can you have as a witness?" The doctor says, "Does it require a witness?" He says, "Yes, it requires two witnesses or three." I asked Dr. Vedder if he and Dr. Wilcox could
F. 1119 act as witnesses if it was important that it should be done. The doctor told him if it was to be done it should be done as quickly as possible. Mr. Vaughan hurriedly put on his overcoat and went back into the room and said to Mr. Fayerweather, "There is a paper to be signed," and Mr. Fayerweather lay in this condition and he opened his eyes wide and says, "Can't it be done Monday?" Dr. Vedder said then, "Mr. Fayerweather if there is any papers to be signed, they must be done to-day," and there was a perfect ashy paleness came over Mr. Fayerweather's face; he then knew for the first time he was to die that day.

119 Q. Did Mr. Vaughan then leave the house?

A. Mr. Vaughan left the house in less than
F. 1120 five minutes, as quickly as he could put on his overcoat.

120 Q. Did he return again that day?

A. Yes.

121 Q. About how long after leaving?

A. Before going, Dr. Vedder—I made the appointment with Dr. Vedder and Dr. Wilcox that they should be there about four o'clock to witness this paper. Dr. Vedder appointed the time as being most convenient for him. Previously he had told me he did not think that Mr. Fayerweather would live till night, but he appointed four o'clock to sign this paper. Mr. Vaughan left the house and returned between one and two.

122 Q. Who came with him?

A. I did not see him when he came, but two young men, Mr. Grout and Mr. Browning from Ritch's office came with him.

123 Q. Did you know at that time they were from Mr. Ritch's office?

A. I did not.

124 Q, Did anyone in the house, so far as you know, at that time know they were from Mr. Ritch's office?

A. I knew nothing about it.

F. 1121 125 Q. Knew nothing about it? A. No. sir.

126 Q. When did you first see them in the house?

A. After Mr. Vaughan left the house, I returned to Mr. Fayerweather at once, and as soon as he could collect himself he commenced talking to me, saying what he wanted me to do.

127 Q. Mr. Fayerweather did?

A. I said to him, "Don't speak of it, don't say it, I cannot bear it." He said, "Now, don't deceive yourself, I am going to die." I said, "Oh, you shall not." He said, "Don't deceive yourself, you cannot deceive me, I shall die to-day, I heard what the doctor said." He then told me what he wanted me to do; and he said at

F. 1122 all times he wanted me to call upon Mr. Vaughan, Morris Beardsley and Mr. Myrick for anything that I might want to know, that Mr. Myrick knew all about his affairs and the others would give me all the information that I desired because he had paid them for doing it, and I was not to offer them any money. He said he had given Mr. Vaughan $25,000, Mr. Myrick $25,000 and Mr. Beardsley $50,000, that I was to go to them for anything I wanted. He said, "I think Mr. Vaughan is my friend, I know Mr. Bulkley to be an honest man." Then there were a few other things he said to me about what he wanted me to do, he asked me to go and take a little rest and ask his wife to come to him; he wanted to talk with her, but

after she came into the room he was not able to carry on any conversation at all.

128 Q. Did you first see Mr. Grout and Mr. Browning before or after they had been in Mr. Fayerweather's room?

A. I saw them as they were going down stairs after having executed this paper.

129 Q. How much time had elapsed from your seeing them going down the stairs and your last previously having seen Mr. Fayerweather?

F. 1123 A. Well, I do not know how long it was. I went to this room to get a little rest, and—

130 Q. And they came after that?

A. And recover myself, and left Mrs. Fayerweather and my niece with Mr. Fayerweather, and they were to call me in case they required me, but I was not called.

131 Q. Were you asleep in the meantime?

A. Oh, no, there was no sleep for me; I was resting.

132 Q. What is your best judgment as to the time that elapsed?

A. Well, I think it was about two o'clock in the afternoon that this paper was, signed, and it was directly after that.

F. 1124 133 Q. That you saw them going down stairs?

A. Yes.

134 Q. Well, I have not made my question clear. What I want to know is, how much time elapsed between your seeing Mr. Fayerweather and leaving him with his wife, as you have stated, and your seeing them go down stairs?

A. Probably an hour.

135 Q. At the time you saw him before seeing Mr. Grout and Mr. Browning going down stairs, can you judge whether Mr. Fayerweather's physical condition was such as to have permitted him sitting up in bed, putting his feet over the side of the bed, and taking something—a

paper—in his lap, signing his name, and saying, "Pshaw, that is a poor signature," or "a pretty signature for a man to make?"

A. I could positively swear that Mr. Fayerweather could not have done anything of the kind. It was utterly impossible.

136 Q. Prior to that time had he then up to a certain period been given massage treatment?

A. Yes, sir.

137 Q. When was that discontinued?

F. 1125 A. Friday night.

138 Q. Do you know why it was discontinued?

A. Because the massageist said that he was too weak, it would do him more harm than good.

139 Q. At the time you last saw him before seeing Mr. Grout and Mr. Browning going down stairs, was Mr. Fayeweather able to sit up without assistance?

A. He could not move himself without assistance.

140 Q. At that time was Mr. Fayerweather able to see to write his name without glasses?

A. Mr. Fayerweather had not written his name, excepting to sign some paper, why, for months.

141 Q. Well, he signed the paper on the 11th of November, it seems.

F. 1126 A. He would sign it with a very strong glass, or sometimes he put on two glasses; but he always had a magnifying glass there right on that table. He could sign his name but not without—oh, he did sign his name, of course, frequently to papers, but his eyesight was so he could not write.

142 Q. When he did sign his name did he use this magnifying glass to guide him in placing his name on the papers?

A. I do not know that he always did that. I have seen him do it sometimes.

143 Q. Did he have spectacles whenever he wrote his name for the latter part of his life?

A. He had two or three pairs of spectacles that the optician said were the strongest that could be furnished, and that is why Dr. Vedder got this magnifying glass for him.

144 Q. In addition to those?

A. In addition to those.

145 Q. Was that glass or were any spectacles with him in the bedroom that day, November 15th, 1890?

A. I do not know that, because I was not there. The spectacles were usually left in the library
F. 1127 in the drawer that was for his private property, the drawer of the library table.

146 Q. By the library you refer to this room in which Mr. Butler and the others were on the 11th of November?

A. Yes, sir; all papers belonging to Mr. Fayerweather were kept in that drawer.

147 Q. Now about where he was on the 15th, was that in the room north of the library, in the northerly part of the house on the second story? A. Yes, sir.

148 Q. Do you know the bed on which he lay on that occasion?

A. Do I know the bed?

149 Q. You know the bed, do you, as it was made, and the height of it from the floor?

F. 1128 A. It was a very low bedstead.

150 Q. Is it possible for any one of Mr. Fayerweather's height to have sat up in that bed and have turned round and put his feet over the side of the bed without having his feet touch the floor?

A. I think it would be quite impossible for him to do that thing.

151 Q. Well, you remember how tall Mr. Fayerweather was, and when sitting naturally what would be the effect, would his feet touch the floor?

A. Certainly. Mr. Fayerweather was not able to move his limbs.

152 Q. I know, but I assume in that question a version

of this affair which has been given which is referred to elsewhere. When did you next see Mr. Fayerweather after seeing Mr. Grout and Mr. Browning going down the stairs?

A. I went immediately to his room.

153 Q. In what condition did you find him?

A. I found him gasping for breath and not able to say anything, his eyes closed.

154 Q. How long or how soon after that did he become apparently conscious again and communicate

F. 1129 with you?

A. From that time?

155 Q. How soon after that?

A. Not at any time concious after that.

156 Q. No?

A. Until about four or half-past four in the afternoon, it was after the gas was lighted, it was the first time he opened his eyes to speak to any one.

157 Q. And what did he say then?

A. He said—opened his eyes very wide, Mr. Vaughan, was sitting by the side of the bed, he looked at me and he said, "What is Vaughan doing here?" I said that he was coming this way "and came in to see how you were." He says, "Oh, no, he has heard I

F. 1130 was going to die to-day, that is why he is here. Vaughan, go out of the room and out of the house." He waved his hand like that, and then he said to me as I stood by the side of him, "I wa-ant to-to-te-ll you something—I c-a-n-'t"—that was the last words he ever spoke. That was the last time he opened his eyes.

158 Q. Did Mr. Vanghan immediately go upon being so addressed by Mr. Fayerweather?

A. He left the room and Mr. Fayerweather's eyes followed him as far as they could in the passageway, and then he said that to me and, I never to my dying day will forget the look he gave me. He wished to say something to me about that man and he could not say it.

159 Q. Were you in California with Mr. Fayerweather in March before his death?

A. We went in March and returned in May.

160 Q. While he was in California did he attempt to write to Mr. Romaine?

A. Yes, sir.

161 Q. Do you remember the occurrence?

A. Mr. Romaine was constructing the tomb at Woodlawn, he was the architect; and I had written some letters to him about it, and always would
F. 1131 break down and feel so badly, that Mr. Fayerweather decided never to ask me to do a thing of that kind again; and Dr. Vedder came to me while we were in Pasadena one morning, and Mr. Fayerweather was in the writing room trying to write a letter and he said, "Mr. Fayerweather is in there trying his best to write a letter, and he cannot write it, he cannot see, he is very much troubled, and he wont let me write it." He said to me, "If I were you I would go to him," and I went to him.

162 Q. You went to Mr. Fayerweather?

A. Yes, I went to Mr. Fayerweather and I asked him what he was trying to do; he said, "I am trying to write a letter to Mr. Romaine, I cannot have the
F. 1132 heart to ask you to do it." I said, "I will do it, I can do it perfectly well, I won't break down." And I wrote the letter for him, it was the directions about the tomb, the construction of it. He dictated it and I wrote it. He had written—torn up two or three pieces of paper that he had tried to write and could not write it, could not see; that was his last attempt to write a letter. That was the last of March.

163 Q. Are you able to say whether Mr. Fayerweather was able to say on November 15th, 1890, whether the penmanship of his signature was good or bad?

A. No, he could not see it. Mr. Fayerweather's eyes showed him dying in the early morning, they were

glazed, he could not have seen anything in the way of writing or printed matter, or anything of the kind.

164 Q. So far as you know, was the execution of the so-called codicil of November 15th, 1890, in Mr. Fayerweather's room without the knowledge of the inmates of the household except Miss Joyce, your niece, that it was going on?

A. Neither Mrs. Fayerweather nor myself knew it.

Mr. Fayerweather previous to his telling me in the morning in his conversation that he had left us in the

F. 1133 hands of these men, I asked him if his matters were made straight as he wanted them regarding his will, and he said yes, as far or as near right as he could make them.

165 Q. Did he ever say anything to you after Mr. Vaughan read his will to him, as to his desire to make another will?

A. Yes.

166 Q. What did he say in that respect?

A. He said he ought to tear up the entire will and make a new one, but he was not equal to it, and Mr. Vaughan assured him that it could be patched up just as well.

167 Q. Now, in addition to the letter, Exhibit

F. 1134 J, of November 15, 1890, which has been read in evidence, you say there was another prepared on the same day by Mr. Vaughan?

A. On November 13th?

168 Q. Yes. A. Yes.

169 Q. Now, please look at page 297 of the Court of Appeals record previously identified, and state whether the letter, Exhibit K, found there is a correct copy of that letter?

A. This?

70 Q. Yes, this whole letter?

A. That letter was written by Mr. Vaughan, signed by Mr. Fayerweather.

Mr. Sherman: I offer it in evidence, Exhibit K. It is as follows:

"11 East Fifty-seventh Street, N. Y. City.
November 13, 1890.

Mr. Thomas G. Ritch:

Dear Sir: I have examined my original will, and the first, second and third codicils thereto, handed by you to Mr. Vaughan at my request.

By the tenth article of my will I left my resid-
F. 1135 uary estate to my executors in trust to be equally divided among certain corporations and institutions.

By the first codicil, it seems that I revoked this tenth article of my will, and then made the following disposition of my residuary estate:

'III. All the rest and residue of my estate, of whatsoever character and wheresoever situated the same may be, of which I shall die possessed and remaining after the provisions of the first nine paragraphs of my will have been fully complied with and carried into effect, I give, devise and bequeath to Justus L. Bulkley and Thomas G. Ritch, named in the eleventh paragraph of my said will, to them and their heirs forever.

F. 1136 Please advise me at once, in writing, what is the legal effect of this clause, and to whom and how would my residuary estate go in case of my death, supposing this first codicil to remain in force.

Yours truly,
D. B. Fayerweather."

171 Q. Mrs. Reynolds, in reply to that letter was any received from Mr. Ritch?

A. Yes, sir.

172 Q. Do you know what became of the original?

A. Why, I have seen it—well, it was produced in Court when I was on the stand.

173 Q. And is that the last you have seen of it?

A. That is the last I have seen of it.

174 Q. State whether the copy, Exhibit L, on page 298 and page 299 of the Court of Appeals' record is a correct copy of it? A. That is right.

Mr. Sherman: I offer it in evidence, Exhibit L. It is as follows:

"Arnoux, Ritch & Woodford.
William H. Arnoux,
Thomas G. Ritch,
Stewart L. Woodford,
F. 1137 Haley Fiske,
C. N. Bovee, Jr.,
William C. Wallace,

18 Wall Street, New York,
November 14th, 1890.

D. B. Fayerweather, Esq.,

Dear Sir: The intention of the change in question was to enable Messrs. Bulkley and myself to carry out the intentions of the will as modified by the various private memoranda in my possession. Neither Mr. Bulkley nor myself would have any moral right to treat any portion of your estate otherwise than we know would conform to your wishes. I suggest that I call on you with these, and if still approved by you, that they be left in a sealed package with Miss Joyce or anyone named by
F. 38 you. The legal effect of the clause in question is to vest the title to the residuary estate in Messrs. Bulkley and myself; but, as I have said, neither Mr. Bulkley nor I would wish to derive any personal benefit under this codicil.

Yours truly,
Thomas G. Ritch."

175 Q. Did you receive yourself from Mr. Ritch about the same time a personal letter referring to this subject?

A. I received a letter from Mr. Ritch on Friday evening.

176 Q. And where is the original of that letter, if you know?

A. I do not. I saw it in the Court room.

77 Q. But not in your possession or control?

A. It was in my possession, but some one the day Mr. Fayerweather died took it out of the drawer in our sitting room and it was produced in the Court. Mr. Vaughan had it.

178 Q. And it has not since been in your control?

A. Never.

179 Q. State whether the copy on pages 302 and 303 of the same record, Exhibit O, is a correct copy F. 1139 of that letter?

A. Yes, that is correct.

Mr. Sherman: I offer it in evidence, Exhibit O. It is as follows:

"New York, November 13th, 1890.

My Dear Miss Joyce:—I have had two long talks with Mr. Vaughan to-day and yesterday, and I fear Mr. Fayerweather is worrying over his business matters. Mr. Vaughan says that Mr. F. is too ill to be seen, and so I would be glad to have you say to him, if you think it well, that I will execute any paper or say anything in your presence, or in that of any one else that will enable him to feel that his wishes will be"—partly written and erased, what seems to be the letters c-o-m-p-l, as F. 1140 if the writer had started to write "complied with" and changed it—"carried out to the letter. It would be a misfortune indeed to me to lose his confidence after so many years, through any misunderstanding now. The will and codicils provide carefully for the institutions in which he was interested and for the relatives and friends to whom he was attached, and I know that, at the time the papers were drawn, the reasons for each paragraph were considered and approved by him the object being to prevent any contests.

I write thus freely to you, because you have known of Mr. Fayerweather's affairs, and I believe that you, as well as he, believe that I have only tried to do my duty.

If at any time you or Mr. Fayerweather would like to see me, I will call.

Sincerely yours,

Thos. G. Ritch."

180 Q. Did you attend the trial of the contest in the Surrogate's Court over the admission to probate of the codicils of Mr. Fayerweather's will?

A. Yes, nearly every day.

181 Q. Did you have a conversation with Mr.
F. 1141 Henry B. Vaughan during the progress of that contest in or near the Surrogate's Court?

A. Mr. Vaughan had a conversation with me.

182 Q. State what transpired on that occasion.

A. It was after the session of the Court; nearly every one had left the Court room. Dr. Irwin was there with me. Just as we had started to leave the Court room Mr. Vaughan said very abruptly, "Miss Joyce, I want to speak to you." I stepped to one side and he said, "I am going to fight this thing just as long as there is a dollar left of the Fayerweather estate or as long as I have a dollar of my own private fortune. I want you to tell Mrs. Fayerweather that, have her understand that."

At the same time he shook his fist in my face
F. 1142 and it brushed my cheek.

183 Q. Did you tell Mrs. Fayerweather of this occurrence? A. I did.

184 Q. What did she say, what was the effect upon her?

A. It made her very ill. I said to her that I never would go into the Court room to be insulted by the man who should have been our best friend, and she said that perhaps we had better settle that matter, even if we got nothing, we could not be dragged into Courts to be insulted that way. She became very ill and it was necessary for the doctor to increase his visits and the doctor

said I ought not to have told her, and I was very much alarmed myself for the effect it had on her.

185 Q. Did you know of her signing the papers containing the agreement to withdraw the contest and also releases subsequently, in view of that, did you?

A. I did, yes.

186 Q. Are you able to say whether at the time she signed those papers, or any of them, she was in her normal condition of strength and firmness of mind or otherwise?

F. 1143 A. I think her mind all the time was clear; Mrs. Fayerweather had no trouble that way.

187 Q. No, but as to her resolution, her firmness of resolution?

A. Oh, yes.

188 Q. Was that or was it not shaken by these events?

A. Well, I knew that she became very nervous and worried and feared that she should never get money enough to pay her bills, and decided that she had better settle and thus get some money to pay what she owed.

189 Q. Well, during the time of this contest from the time of Mr. Fayerweather's death until the execution of the releases, what was her condition in regard

F. 1144 to money affairs?

A. She had no money. She had less than one hundred dollars by her when Mr. Fayerweather died. There were no bills paid until after she signed the releases. Mr. Fayerweather's funeral expenses, all the grocery bills, for the servants—she borrowed money of a friend to pay her servants, and she had no money to pay any bills, she simply was living on credit.

190 Q. Did she say anything to you to indicate whether her signing these papers, these releases, was an exercise of choice on her part, or the reverse, or otherwise?

A. No, it was not. She said, "Vaughan says that he will spend the entire fortune, and he has it in his

power to do it. I have uothing, there will nothing come to me, that if they will give me that I had better take it, as I cannot help myself."

191 Q. On the Saturday of Mr. Fayerweather's death was he during the morning continuously conscious?

A. No, he was not.

192 Q. What lapse from that condition, if any, occurred? Can you describe his condition?

A. Well, in talking with me after Mr. Vaughan left him, he would say a few words and close his
F. 1145 eyes and then after an interval of a few minutes he would try again and say some more; but at the same time his story was not at all connected.

193 Q. Was that a change from his previous use of his mind and talk?

A. Yes, sir; Mr. Fayerweather had a remarkably quick thought, and in saying anything or doing anything he was a man of few words and very concise in anything that he said, and he said it very plainly, with as few words as possible.

194 Q. Did you say that on Saturday his conversation was not consecutive?

A. Not consecutive.

195 Do you mean that it was not coherent?

F. 1146 A. Well, a man in that condition, dying, his lungs filled, you can imagine what it is, struggling for breath and trying to say his last words to his family—

196 Q. Do you mean that his mental operations were interrupted by his physical struggles?

A. Possibly I—

197 Q. Is that the way you saw it?

A. I think his brain was as clear as possible for a man to be in his dying condition; but I think Mr. Fayerweather cared very little for the things of this world except separation from his family when he knew he was going; I don't think his mind was on disposing of his prop-

erty, or things of that kind; he was not that kind of a man.

198 Q. Was anything said by Mr. Fayerweather at the time Mr. Vaughan read his will to him, in regard to that provision of the legacy to you, which provided for that legacy so long as you remained unmarried, and if so, what?

A. I heard a remark which I did not at that time understand. I understand fully now. I heard Mr. Fayerweather say in a very excited
F. 1147 manner, "I never did it, I never did it; that girl has given her life for me." I know now what it meant.

199 Q. While this memorandum which was taken away to be given to Mr. Butler was prepared, was it possible for you if you had paid attention to have heard it all?

A. It was possible for me to have heard it all, and there was not the slightest objection to my hearing it all, and it was possible for me to read every word of it and Mr. Fayerweather would not have objected.

200 Q. Well, he did not object, did he?

A. He did not object.

201 Q. And he knew you were there and could hear it?

A. Yes.

F. 1148 202 Q. And his instructions to Mr. Vaughan occurred under those circumstances?

A. Yes, there was nothing secret or private about the construction of that codicil; there was not a closed door.

203 Q. Who was it that made the arrangements for witnesses to come at four o'clock to witness the paper on November 15th, 1890?

A. I asked the doctor at the time he told Mr. Vaughan—Mr. Vaughan told him there was a paper to be executed—I asked the doctor if he would not engage Dr. Wilcox.

202 Q. Was that in Mr. Vaughan's presence?

A. That was in Mr. Vaughan's presence, but not in Mr. Fayerweather's presence; it was in the sitting room.

205 Q. What, if anything, was done when Mr. Browning and Mr. Grout came in reference to the engagement previously made with Dr. Vedder to witness the paper?

A. Well, before I knew of it at all—in fact, I never thought of it again until after Mr. Fayerweather's death—but Mr. Vaughan sent our colored butler to Dr. Vedder to say his services would not be required. I knew nothing of it.

F. 1149 206 Q. While Mr. Fayerweather was in the condition you have described following the departure of Mr. Browning and Mr. Grout, did Mr. Vaughan say anything in his presence about burning any paper, and if so, what did he say and what happened?

A. He said to me in the sitting room, I passed through from one room to another, of course, I was in attendance on Mr. Fayerweather, he said—

207 Q. You were in attendance on Mr. Fayerweather?

A. Yes, and I passed through the sitting room and he was there.

208 Q. Who was there.

A. Mr. Vaughan was there, and Mr. Vaughan said,

F. 1150 "I want you to go with me to the kitchen fire and burn a paper," and I said, "I cannot go now, Mr. Vaughan," and he said, "Well, as soon as you can." I went back to Mr. Fayerweather and attended to him, and when I could, in a few minutes, I came back and I said, "What did you want?" and he followed me back into the room and said, "Mr. Fayerweather"—he put his hands into his pocket and took out an envelope, it was in a long envelope, and held it up and said, "Mr. Fayerweather, do you want this paper destroyed?" He never opened his eyes but nodded his head. He was sitting as straight as I am now. And Vaughan said, "Do you want Miss Joyce to destroy it?" and he nodded his head the same

as he answered every question during the day; whether he meant yes or no, it was by a nod.

209 Q. And what was done with the envelope?

A. He said, "This paper, I want—"

210 Q. Who said? A. Mr. Vaughan.

211 Q. You went with him afterwards— A. I went with him down to the kitchen fire and Mr. Vaughan took the lid from the range, took this envelope from his pocket and said, "put that envelope into the fire," and I did it.

212 Q. Do you know what was in the enve-
F. 1151 lope?

A. I do not.

213 Q. Was it possible for either Mr. Fayerweather or yourself to know what was in it?

A. It was never mentioned to Mr. Fayerweather or to me either; it was not possible for us to know.

214 Q. Did you hear Mr. Vaughan testify upon the trial of the will contest in the Surrogate's Court. A. I did.

215 Q. And did you also hear him testify on the trial of what we call the Five Colleges' action before Judge Truax?

A. Yes.

216 Q. Did you hear Mr. Vaughan give an account of the destruction of that paper while he was a wit-
F. 1152 ness on the stand in either of those trials?

A. The first time I knew what the paper was—

217 Q. Well, did you first? A. Yes.

218 Q. You did hear it?

A. Yes. The first time I knew what the paper destroyed was the codicil of the 11th was when he was asked in Court what became of this paper; he said "burned by Miss Amelia Joyce."

219 Q. And have you just stated the circumstances attending its burning, if it was burned?

A. Yes, that is all there was to the burning if it was burned.

220 Q. Did he state on the witness stand whether it was burned by Mr. Fayerweather's direction?

A. I do not remember that. I was so shocked—

221 Q. Did Mr. Fayerweather give any other direction on the subject except what you have just stated?

A. He never spoke a word, he did not even open his eyes.

222 Q. And how long after that question was asked him by Mr. Vaughan to which he nodded in reply was it when he ordered Mr. Vaughan from the room, as you

F. 1153 have stated?

A. Oh, I could not give you the exact time, but quite an interval between that time and the other.

223 Q. Was the house so constructed that it would have been possible or convenient to have destroyed that paper in Mr. Fayerweather's presence?

A. Certainly, there was an open fire place at the foot of his bed where he could have seen it.

226 Q. Was there anything more necessary than to touch a lighted match to the paper to burn it in that room?

A. Nothing; it was an open fire place. Mr. Fayerweather in his life insisted that every paper, every letter, should be destroyed in his presence. He never allowed me even to pass into another room to destroy one

F. 1154 of his papers, but said, "Do it here, where I can see it."

225 Q. Mrs. Reynolds, when did you or Mrs. Fayerweather, to your knowledge, first know that a codicil to Mr. Fayerweather's will had been executed on the day of his death, and by what means did you learn it?

A. Not until—we never realized it until we saw it in the papers, published in the daily papers.

226 Q. Was the will and was the codicil read in your presence at any time after Mr. Fayerweather's death, and if so, when?

A. Immediately after their return from the funeral, from Woodlawn, it was read in the dining room.

227 Q. At 11 East 57th street?

A. At 11 East 57th street.

228 Q. Did Mr. Ritch have any conversation with you just prior to the reading of the will?

A. He did.

229 Q. You and he alone?

A. In the parlor, he called me into the parlor and said to me that there was a provision in the will regarding my annuity if married, I was not to receive it after I married, and he said that—I asked him if Mr.

F. 1155 Fayerweather directed that and he said no, but when he read the will he presumed it escaped his notice. At the time he wrote he did not know me or did not know what relation I was to Mr. Fayerweather;" but as I understand the case now, I know Mr. Fayerweather could not have understood it when I read the will to him." He told me that Mr. Woodford—as long as he lived I should have that annuity, even if I married tomorrow, "and if I should die, Mr. Woodford has charge of my affairs and he will see that you have it."

230 Q. Did he state how he came to put it in the will?

A. He said it was a customary way of drawing a will when you give annuities that way.

231 Q. Well, did he read that clause in the

F. 1156 will afterwards before the people?

A. He said, "Now to spare your feelings I will not read that clause. He was very considerate.

232 Q. And he did not read it?

A. He did not read it.

233 Q. Did he leave out anything else in reading the will and codocils when they were read on that occasion?

A. No, I think not—I don't know what he left out, I don't think really my sister or myself understood that will at all, we were feeling too badly to care or know what was in the will, and he read it and took it away with him.

234 Q. Did you receive from Mr. Ritch on or about the 13th of November a letter containing a suggestion that Mr. Ritch should call on Mr. Fayerweather?

A. Yes.

235 Q. Look at the Court of Appeals' record previously identified and at page 818, and state whether that is a correct copy of that letter?

A. Yes.

236 Q. Except—I suppose—was it signed Thomas G. Ritch or T. G. Ritch?

F. 1157 A. Thomas G. Ritch, I believe, that is the way he used to sign his letters.

Mr Sherman: I offer that letter in evidence, as follows:

"Arnoux, Ritch & Woodford,
18 Wall Street, N. Y.

November 13th, 1890.

My Dear Miss Joyce—I have had two long talks with Mr. Vaughan Friday and yesterday, and I fear Mr. Fayerweather is worrying over his business matters. Mr. Vaughan says that Mr. Fayerweather is too ill to be seen, and so I would be glad to have you say to him, if you think it well, that I will execute any papers,

F. 1158 or anything in your presence, or in that of anyone else, that will enable him to feel his wishes will be carried out to the letter. It would be a misfortune, indeed, to me to lose his confidence after so many years through any misunderstanding now. The will and codicils provide carefully for the institutions in which he was interested, and for the relatives and friends to whom he was attached, and I know that at the time the papers were drawn the reasons for each paragraph were known and approved by him, the object being to prevent any contest. I write this to you because you have known of Mr. Fayerweather's affairs and I believe that you as well as he believes that I

have only tried to do my duty. If at any time you or Mr. Fayerweather want to see me I will call.

Sincerely yours."

237 Q. Did you on or about the same date receive from Mr. Vaughan a letter reporting his interview with Mr. Ritch?

A. I did.

238 Q. Look at the Court of Appeals' record previously identified, at page 821, and state whether
F. 1159 that is a correct copy of that letter?

A. Yes, that is right. It was signed "Hall & Vaughan."

Mr. Sherman: I offer that letter in evidence. It is as follows:

"Hall & Vaughan,
Hides and Leather,
18 Ferry Street,
NEW YORK, November, 13, 1890.

Dear Miss Joyce:—Will you please explain to Mr. Fayerweather that I have obtained the letters from Mr. Ritch. At first, Mr. Ritch stated that he would take the papers to Mr. Fayerweather, but I reminded him that the letter read to give them to me, and he said he would do it. He grew, however, as white as the pa-
F. 1160 per upon which I am writing. I will deliver the second letter to-morrow. There is, however, but little use in this, and I am convinced from his manner that Mr. Ritch knew exactly what he was doing.

Truly yours,
Hall & Vaughan."

239 Q. When were those letters last in your possession or control?

A. They were in my possession until Saturday morning when I gave Mr. Ritch's letter to Mr. Vaughan;

the other one was on the sitting room table and when I went to look for it it was gone.

240 Q. You mean the Saturday morning of the day of Mr. Fayerweather's death, November 15th, 1890?

A. Yes, and it was afterwards found in Mr. Vaughan's possession.

241 Q. And since that time they have not been in your custody or control? A. No.

242 Q. Did you hear Mr. Vaughan testify on those trials or either of them in regard to some memoran-
F. 1161 dum made by him under Mr. Fayerweather's direction on the Saturday morning of his death, the day of his death?

A. I did, a writing on an envelope or letter.

243 Q. Yes. A. I did.

244 Q. What according to your recollection did Mr. Vaughan then and there testify on that subject?

A. Well, I could not repeat Mr. Vaughan's words, I have never read it, I simply heard it in Court and it is a long time ago, I could not remember it, but I simply know that there was a memorandum written on an envelope.

245 Q. So Mr. Vaughan said?

A. Yes, purporting to be Mr. Fayerweather's
F. 1162 dictation.

246 Q. For the codicil of November 15, 1890?

A. No it was not shown in Court.

247 Q. No, but as a basis for the codicil, which he claimed was to be drawn on November 15, 1890?

A. Yes. If Mr. Fayerweather knew anything about that codicil he was the best actor I ever knew.

248 Q. So far as you know did any such event occur?

A. No, I knew nothing about it. It was done, probably, if it was done at all, when I was at the doctor's.

249 Q. Was Mr. Fayerweather during the time you

were away at the doctor's to get him to come quickly—I think you said? A. Yes.

250 Q. Was Mr. Fayerweather then in a condition to have enabled him to have dictated any further details or disposition of his estate to Mr. Vaughan?

A. I should think not, but what he might have done in my absence, I could not swear to.

251 Q. To the best of your judgment was he able to have done such a thing?

A. His condition was such that he ought not to
F. 1163 have been asked questions of such a nature. I don't know what he might have done.

252 Q. Was he in such a condition that any such action could originate with him? A. No.

253 Q. I do not mean whether Mr. Vaughan could not have spurred him to do anything, but as a voluntary action on his part, was he in a condition that he could have done it?

A. I don't think it could have been possible, but I would not like to swear to what was done when I was absent. Mr. Fayerweather took no nourishment after Friday night of any kind; he could not swallow until he stopped breathing; we moistened his lips and that was all that was done for him; he took no medicine
F. 1164 or nourishment.

Mr. Sherman: You may cross-examine.

Mr. Granger: Counsel for Hamilton College declines to cross-examiue, because the testimony is irrelevant.

ANNER A. REYNOLDS.

Sworn to before me this 4th day of March, 1899.

JOHN A. SHIELDS, *Examiner*.

Adjourned to February 28th, 1899, at 2 P. M.

Mr. Sherman: Complainants now offer in evidence the deposition of Anner Amelia Reynolds.

Mr. Bovee: Upon the Hamilton College plea.

Mr. Sherman: In the Hamilton College record.

TESTIMONY OF ANNER AMELIA REYNOLDS.

Mr. Bovee: Defendants object to the reading of the testimony of Mrs. Reynolds upon the ground that such procedure is unauthorized and illegal and unprecedented, that the only proper way to take the testimony of the witness is to have the witness produced and examined. Defendants insist that the testimony of the witness if taken at all shall be read into the minutes at this time and the objections to the questions and answers noted in each instance.

Defendants object to Question 5 as irrelevant and
F. 1165 immaterial to the issues presented upon the special pleas and as incompetent and calling for the opinion of the witness. Defendants object to Question 7 as irrelevant and immaterial to the issues presented by the special pleas, as incompetent and calling for the opinion of the witness. Defendants object to Question 9 as irrelevant and immaterial to the issues under the pleas and calling for the opinion of the witness; and they move to strike out the words "I was his only nurse" as not responsive to the question.

Defendants object to Question 11 as incompetent, irrelevant and immaterial and calling for the opinion of the witness.

Defendants object to Question 17 as improper in
F. 1166 form and leading, and as irrelevant and immaterial to the issues presented upon the special pleas, and calling for the opinion and conclusion of the witness and not for a fact.

Defendants object to Question 18 as irrelevant and immaterial and incompetent under the issues presented by the special pleas.

Defendants object to Question 20 as irrelevant and immaterial to the issues presented upon the special pleas and incompetent; and move to strike out the answer as giving the conclusion of the witness and not the fact.

The same objection to Question 21.

The same objection to Question 22.

Defendants object to Question 23 as irrelevant and immaterial.

Same objection to Question 24.

Same objection to Question 25.

Defendants object to Question 26 as improper in form and leading and irrelevant and immaterial to the issues presented upon the special pleas and incompetent, calling for the opinion of the witness; and they move to strike out the answer as not responsive to the question and incompetent.

F. 1167 The same objection to Question 27, and the same motion to strike out on the same grounds.

The same objection to Question 28.

Defendants object to Question 29 as irrelevant and immaterial to the issues presented by the special pleas and incompetent.

Same objection to Question 32.

Detendants object to Question 34 as irrelevant and immaterial to the issues presented upon the special pleas, and they move to strike out the answer of the witness as not responsive to the question, and incompetent and giving the conclusions of the witness and her opinion, not facts.

Defendants object to Question 35 as irrelevant
F. 1168 and immaterial to the issues presented upon the special pleas, and incompetent.

Same objection to Question 36.

We move to strike out the answer of the witness to Question 36, as not responsive, and incompetent and giving her conclusions and not the facts.

Defendants object to Question 38 and the answer thereto, as irrelevant and immaterial to the issues presented upon the special plea.

Defendants object to Question 39 as irrelevant and immaterial to the issues presented upon the special pleas, and we move to strike out all before "I came into the room" as not responsive to the question and incompetent.

Defendants object to Question 40 as irrelevant and immaterial to the issues presented upon the special pleas.

Defendants object to the reading of the letter after Question 41 and at page 337 of the stenographer's minutes as irrelevant and immaterial to the issues presented upon the special pleas.

Defendants object to Question 42 as irrelevant and immaterial to the issues presented upon the special pleas.

Same objection to Question 43.

Same objection to Question 44.

F. 1169 Same objection to Question 45.

Same objection to Question 46.

Same objection to Question 47.

Defendants object to Question 48 as irrelevant and immaterial to the issues presented upon the special pleas and as incompetent; and we move to strike out the answer of the witness to Question 48 as not responsive to the question.

Defendants object to Question 51 as irrelevant and immaterial to the issues presented by the special pleas and incompetent.

Defendants object to Question 52 as improper in form and leading, and irrelevant and immaterial to the issues presented upon the special pleas, and incom-

F. 1170 petent as calling for the opinion of the witness, and not for the fact or the language used; and we move to strike out the answer of the witness as not responsive to the question.

The same objection to Question 53.

The same objection to Question 54.

Defendants object to Question 55 as irrelevant and immaterial to the issues presented upon the special pleas.

The same objection to Question 56 and the further objection that it is incompetent as calling for the conclusion of the witness.

The same objection to Question 57.

Defendants object to Question 58 as irrelevant and im-

material to the issues presented by the special pleas, and we move to strike out the answer of the witness as not responsive. We further object to Question 58 upon the ground that it calls for a personal transaction between the deceased, Mr. Fayerweather, and the witness contrary to Section 829 of the Code of Civil Procedure of New York, and now moves to strike out the answer of the witness as not responsive to the question, giving conclusions and not facts. And we move to strike out all after the words "I asked Mr. Fayerweather," as
F. 1171 not responsive to the question, as irrelevant and immaterial to the issues presented upon the special pleas, and as incompetent and a violation of Section 829 of the Code of Civil Procedure of the State of New York.

Defendants object to Question 59 as irrelevant and immaterial to the issues presented by the special pleas.

The same objection as to Question 60.

The same objection as to Question 61.

Defendants object to Question 63 as irrelevant and immaterial to the issues presented upon the special pleas and incompetent.

Same objection to Question 64.

Same objection to Question 65.

F. 1172 Same objection to Question 66.

Same objection to Question 67.

Same objection to Question 68.

Defendants object to Question 69 as irrelevant and immaterial to the issue presented upon the special pleas, incompetent and a violation of Section 829 of the Code of Civil Procedure. We object to the statement of the witness as follows: "Well, after the first stormy attack on Mr. Ritch," as incompetent. We move to strike out the whole answer of the witness as not responsive to the question, giving her conclusions and not facts.

Defendants move to strike out the following words in the answer to Question 70 as not responsive to the ques-

tion and as incompetent and a violation of Section 829 of the Code of Civil Procedure and irrelevant and immaterial; the words are as follows: "Although he said something to me afterwards."

Defendants object to Question 71 as irrelevant and immaterial to the issues presented upon the special pleas and as incompetent and a violation of Section 829 of the Code and calling for a personal transaction between the witness and deceased; and we move to strike out the answer of of the witness upon the same grounds.

F. 1173 Defendants object to Question 72 as improper in form and leading, irrelevant and imaterial to the issues presented upon the special pleas, and incompetent as calling for a personal transaction between the witness and the deceased and contrary to Section 829 of the Code of Civil Procedure.

Defendants object to Question 74 as irrelevant and immaterial to the issues presented upon the special pleas.

Defendants object to Question 75 as irrelevant and immaterial to the issues presented upon the special pleas and moves to strike out the answer of the witness as not responsive to the question, as giving her conclusions and not facts.

Defendants object to Question 76 as irrelevant
F. 1174 and imaterial.

Same objection to Question 77.

Same objection to Question 78.

Same objection to Question 79.

Same objection to Question 80.

Defendants object to Question 98 as improper in form and leading, and irrelevant and immaterial to the issues presented upon the special pleas and as incompetent, and we move to strike out the answer of the witness as not responsive and incompetent and giving her conclusions and not facts.

The same objection as to Question 99 and the same motion to strike out the answer to that question.

Defendants object to Question 100 as improper in form and leading, irrelevant and immaterial to the issues presented upon the special pleas and incompetent as calling for the opinions and conclusions of the witness, and they move to strike out all after the word "excited" as not responsive to the question.

Defendants object to Question 101 as improper in form and leading, irrelevant and immaterial to the issues presented upon the special pleas, and incompetent and calling for the opinion of the witness and not a fact,
F. 1175 and we move to strike out the answer of the witness as not responsive, and irrelevant and immaterial and incompetent.

Defendants object to Question 102 as irrelevant and immaterial to the issues presented upon the special pleas and we move to strike out the answer of the witness upon the same ground and upon the further ground that it is incompetent and not responsive to the question.

Defendants object to Question 103 as improper in form and leading, irrelevant and immaterial to the issues presented upon the special pleas, and as incompetent as calling for the opinion and conclusion of the witness and not for a fact.

The same objection to Question 104.

F. 1176 The same objection to Question 105.

The same objection to Question 106.

The same objection to Question 107.

We move to strike out the answer to Question 107 as irrelevant and immaterial to the issues presented upon the special pleas, incompetent, in violation of Section 829 of the Code of Civil Procedure of the State of New York.

Defendants object to Question 108 as irrelevant and immaterial to the issues presented upon the special pleas and incompetent as involving a personal transaction between the witness and the deceased and contrary to Section 829 of the Code of Civil Procedure.

The same objection to Question 109.

We move to strike out all after the words "would kill me" as not responsive to the question and incompetent.

Defendants object to Question 111 as irrelevant and immaterial to the issues presented upon the special pleas and we move to strike out the words "Mr. Fayerweather had told me he would be there by appointment. I said to him "I shall not let you see anyone to-day." He says "If Mr. Vaughan comes here I must see him," as not responsive to the question and incompetent, and
F. 1177 in violation of Section 829 of the Code of Civil Procedure. Upon the same grounds we move to strike out the words "I want you to give him that letter of Mr. Ritch and all the rest of the answer as not responsive to the question and irrelevant and immaterial.

Defendants move to strike out all after the words "for Dr. Vedder" in the answer to Question 112 as not responsive to the question and irrelevant and immaterial to the issues presented upon the special pleas, as incompetent, giving the conclusions of the witness and not the facts.

Defendants object to Question 113 as irrelevant and immaterial.

Same objection to Question 115.

Defendants object to the answer to Question 116
F. 1178 as not responsive to the question, irrelevant and immaterial to the issues presented upon the special pleas, and incompetent, giving conclusions and opinions and not facts.

Defendants object to Question 117 as irrelevant and immaterial; and they move to strike out all after the words "he says" as not responsive to the question and incompetent.

Defendants object to Question 118 as irrelevant and immaterial and moves to strike out the answer of the witness to Question 118 as not responsive to the question and incompetent and involving conclusions.

Defendants object to Question 119 as irrelevant and

immaterial to the issues presented upon the special pleas and incompetent.

Defendants object to Question 121 as irrelevant and immaterial; and they move to strike out all before the words "and returned between one and two" as not responsive to the question and as giving the conclusions of the witness and incompetent.

Defendants object to Question 122 as irrelevant and immaterial to the issues presented upon the special plea.

The same objection to Question 123.

F. 1179 Defendants object to Question 126 as irrelevant and immaterial; and they move to strike out the answer of the witness as not responsive to the question, giving the conclusion of the witness and a conversation with the deceased, Mr. Fayerweather, in violation of Section 829 of the Code of Civil Procedure.

Defendants object to Question 127 as irrelevant and immaterial to the issues presented upon the special pleas and incompetent and in violation of Section 829 of the Code of Civil Procedure, and they move to strike out the answer of the witness as not responsive and incompetent, giving a personal conversation or transaction between the witness and the deceased Mr. Fayerweather in violation of Section 829 of the Code of Civil Procedure.

F. 1180 Defendants object to Question 132 as irrelevant and immaterial to the issues presented upon the special pleas; and they move to strike out the answer of the witness as not responsive to the question.

Defendants object to Question 135 as improper in form and leading; they further object on the ground that it is irrelevant and immaterial to the issues presented upon the special pleas, and incompetent as calling for the opinion of the witness and her conclusions and not facts; and we move to strike out the answer of the witness as incompetent, testifying to a transaction which occurred and at which she was not present.

Defendants object to Question 138 as irrelevant and

immaterial to the issues presented upon the special pleas, incompetent, calling for the opinion of the witness; and they move to strike out the answer of the witness as not responsive to the question and as incompetent.

Defendants object to question 139 as irrelevant and immaterial to the issue presented by the special pleas, incompetent as calling for the opinion of the witness and her conclusions.

The same objection to Question 140, and we move to strike out the answer of the witness as not re-
F. 1181 sponsive.

We move to strike out the following words in the answer to Question 141 as not responsive: "But his eyesight was so that he could not write."

Defendants object to Question 150 as irrelevant and immaterial to the issues presented upon the special pleas, and calling for the opinion of the witness and not a fact.

We move to strike out the following words in answer to the Question 151 as not responsive: "Mr. Fayerweather was not able to move his limbs."

Defendants object to Question 153 as irrelevant and immaterial to the issues presented upon the special pleas, and incompetent as calling for the con-
F. 1182 clusion and opinion of the witness.

Same objection to Question 154.

Same objection to Question 155.

Defendants move to strike out the answer to Question 156 as not responsive to the question, and as irrelevant and immaterial to the issues presented upon the special pleas.

Defendants object to Question 157 as irrelevant and immaterial to the issues presented upon the special pleas, and incompetent and calling for a conversation between the witness and the deceased contrary to Section 829 of the Code of Civil Procedure.

Defendant objects to Question 158 as irrelevant and

immaterial to the issues presented upon the special pleas, and they move to strike out the following words in the answer of the witness to that question: "And then he said to me, and I will never to my dying day forget the look he gave me he wished to say something to me about that man and he could not say it," as incompetent and not responsive to the question as giving the conclusion of the witness and her opinions and not facts.

Defendants object to Question 160 as irrelevant, immaterial and incompetent in that it calls for a
F. 1183 personal transaction between the witness and the deceased contrary to Section 829 of the Code of Civil Procedure. We object to and we move to strike out so much of the answer as gives the conversation between the witness and Dr. Vedder as not responsive and irrelevant and immaterial. We move to strike out the rest of the answer in response to the question as incompetent, as the conclusions of the witness and not facts.

Defendants object to Question 162 as irrelevant and immaterial to the issues raised by the special pleas and they move to strike out all after the words "Yes" in the first line as not responsive to the question as incompetent,
as being in violation of Section 829 of the Code
F. 1184 involving a personal transaction between the witness and the deceased.

Defendants object to Question 163 as irrelevant and immaterial to the issues presented upon the special pleas, as incompetent, as calling for the opinion of the witness and not a fact. We move to strike out the following words in the answer of the witness as not responsive to the question: "Mr. Fayerweather's eyes showed him dying in the early morning; they were glazed, he could not have seen anything in the way of writing or printed matter or anything or the kind," as incompetent, and giving the opinion of the witness and not a fact.

Defendants object to Question 164 as irrelevant and immaterial to the issues raised by the special pleas.

Defendants moves to strike out the following words in the answer to Question 164 as not responsive to the question and as incompetent, irrelevant and immaterial: "Mr. Fayerweather, previous to his telling me in the morning in his conversation that he had left us in the hands of these men, I asked him if his matters were made straight as he wanted to have them regarding his will and he said yes so far or as near as he
F. 1185 could make them." Defendants further move to strike out upon the ground that the testimony of the witness is incompetent being in violation of Section 829 of the Code involving a transaction between the witness and the deceased.

Defendants object to Question 165 as irrelevant and immaterial to the issues presented upon the special pleas, as incompetent, involving a transaction between the witness and the deceased contrary to Section 829 of the Code.

Same objection to Question 166.

Defendants object to Question 167 as irrelevant and immaterial.

Defendants object to the letter offered in evi-
F. 1186 dence after Question 170 upon the ground that it is irrelevant and immaterial to the issues presented by the special pleas.

Defendants object to Question 171 as irrelevant and immaterial.

The same objection to Question 172.

The same objection to Question 173.

The same objection to Question 174.

Defendants object to the letter after Question 174 referred to as Exhibit L as irrelevant and immaterial to the issues presented upon the special pleas.

Defendants object to Question 175 as irrelevant and immaterial to the issues presented upon the special pleas.

Same objection to Question 176.

Same objection to Question 177.

Same objection to Question 178.

Same objection to Question 179.

Defendants object to the letter offered in evidence after Question 179 as Exhibit O as irrelevant and immaterial to the issues presented upon the special pleas.

Defendants object to Question 182 as irrelevant and immaterial to the issues presented upon the special pleas.

F. 1187 Defendants object to Question 183 as irrelevant and immaterial to the issues presented upon the special pleas and as incompetent, involving a personal transaction between the witness and Mrs. Fayerweather contrary to Section 829 of the Code of Civil Procedure.

Defendants object to Question 184 as irrelevant and immaterial to the issues presented upon the special pleas as incompetent and calling for a conclusion and opinion and not a fact, and contrary to Section 829 of the Code as calling for a personal transaction between the witness and the deceased Mrs. Fayerweather. Defendant move to strike out the answer of the witness upon the same grounds.

F. 1188 Defendants object to Question 185 as improper in form and leading, and assuming facts not proven, and irrelevant and immaterial.

Defendants object to Question 187 as incompetent as calling for the opinion and conclusion of the witness and not for a fact. We object to the question in form and leading.

Defendants object to Question 188 as irrelevant and immaterial upon the issues presented by the special pleas, as incompetent, calling for the conclusion and opinion of the witness and the witness is not qualified to express the opinion.

Defendants move to strike out the following words of the answer as not responsive to the question: "And

feared that she would not get money enough to pay her bills, and decided that she had better settle and thus get some money and pay what she owed," and as involving the conclusion and opinion of the witness.

Defendants object to Question 190 as irrelevant and immaterial and incompetent, calling for a personal communication between the witness contrary to Section 829 of the Code. Defendants object to the question as improper in form and leading.

Defendants object to Question 191 as irrelevant
F. 1189 and immaterial to the issues presented upon the special pleas.

Defendants object to Question 192 upon the same grounds and upon the further ground that the question is incompetent as calling for the opinion and conclusion of the witness, and moves to strike out the answer as not responsive to the question and being in violation of Section 829 of the Code.

Defendants object to Question 193 as incompetent, irrelevant and immaterial, as calling for the opinion and conclusion of the witness.

Defendant object to Question 194 as improper in form and leading, and irrelevant and immaterial to the issues raised by the special pleas.

F. 1190 Defendants object to Question 195 as incompetent, irrelevant and immaterial, and moves to strike out the answer of the witness as not responsive to the question and as incompetent.

Defendants object to Question 198 as irrelevant and immaterial to the issues presented by the special pleas and incompetent.

Defendants move to strike out the statement "I know now what it meant" as not responsive.

Defendants object to Question 199 as incompetent, irrelevant and immaterial and calling for the opinion of the witness.

Defendants object to Question 200 upon the same grounds and upon the further ground that it calls for a personal transaction between the witness and the deceased Mr. Fayerweather contrary to Section 829 of the Code.

The same objection to Question 201.

Defendants object to Question 203 as incompetent, irrelevant and immaterial.

F. 1191

Adjourned to February 7th, 1901, at 10:30 A. M.

NEW YORK, February 7th, 1901.

Met pursuant to adjournment. Present: The Examiner, Mr. Sherman, Mr. Blaikie, Mr. Bovee, Mr. Carnochan, a representative of Root, Howard, Winthrop & Stimson, a representative of Russell & Holmes, and a representative of Nash & Jones.

F. 1192 Mr. Bovee: Defendants object to Question 204 as incompetent, irrelevant and immaterial.

Same objection Question 205, and we move to strike out the answer as not responsive to the question and as incompetent, irrelevant and immaterial.

Defendants object to Question 206 as improper in form and leading and incompetent, irrelevant and immaterial.

Defendants object to Question 208 as incompetent irrelevant and immaterial, and move to strike out the whole answer as not responsive to the question, and upon the ground that it is irrelevant and immaterial to the issues presented upon the special pleas, and in-

competent involving a personal transaction between the witness and the deceased contrary to Section 829 of the Code of Civil Procedure.

Defendants object to Question 209 as irrelevant and immaterial.

Same objection to Question 210.

Same objection to Question 211, and we move to strike out the answer of the witness as not responsive to the question and incompetent, irrelevant and immaterial.

Defendants object to Question 213 as irrelevant
F. 1193 and immaterial, and incompetent as calling for the opinion and conclusion of the witness and not for a fact.

Defendants object to Question 216 as irrelevant and immaterial, and incompetent as calling for the conclusion of the witness as to the testimony of Mr. Vaughan, as the record of the testimony is the best evidence of what he testified to there.

The same objection to Question 217.

The same objection to Question 218, and we move to strike out all after the word "Yes," as not responsive to the question, and as incompetent, irrelevant and immaterial.

Defendants object to Question 219 as irrelevant
F. 1194 and immaterial and incompetent and hypothetical. Defendants object to Question 220 upon the ground that it is incompetent, irrelevant and immaterial and calls for the conclusion of the witness as to the testimony of Mr. Vaughan, and we move to strike out the words, "I was shocked," as not responsive.

Defendants object to Question 221 upon the ground that it is incompetent, and calls for the conclusion and opinion of the witness and not for the facts, and we move to strike out the answer of the witness as not responsive to the question, and incompetent.

Defendants object to Question 222 as incompetent, irrelevant and immaterial.

Defendants object to Question 223 as irrelevant and immaterial, and incompetent as calling for the opinion of the witness and not for facts.

The same objection to Question 224, and we move to strike out all after the words, "It was an open fireplace," as not responsive to the question, and irrelevant and immaterial, and incompetent, and contrary to Section 829 of the Code of Civil Procedure, giving personal transactions between the witness and deceased.

Defendants object to Question 225 as irrelevant
F. 1195 and immaterial to the issues presented upon the special pleas and incompetent. It is manifestly impossible for the witness to speak of her own knowledge for Mrs. Fayerweather.

Defendants object to Question 228 as irrelevant and immaterial to the issues raised by the pleas.

The same objection to Question 229, and we move to strike out the answer of the witness as not responsive to the question and as irrelevant and immaterial.

The same objection to Question 230.

The same objection to Question 231.

Defendants object to Question 233 as irrelevant and immaterial to the issues presented by the special pleas, as incompetent as calling for the opinion of the
F. 1196 witness, and we move to strike out all after the words "He left out" as not responsive to the question, and as incompetent, irrelevant and immaterial and calling for the conclusion and the opinion of the witness as to Mrs. Fayerweather's understanding.

Defenfendants object to Question 234 as incompetent. irrelevant and immaterial.

Defendants object to Question 235 as irrelevant and immaterial.

Defendants object to the letter offered in evidence after Question 238 as irrelevant and immaterial to the issues raised upon the special pleas, and incompetent.

Defendants object to Question 239 as irrelevant and immaterial to the issues presented upon the special pleas.

The same objection to Question 240, and we move to strike out from the answer all after the word "yes" as not responsive to the question and incompetent.

Defendants object to Question 242 as improper in form and leading, and irrelevant and immaterial, and calling for the conclusion of the witness as to what was testified, and the record of the testimony is the best evidence.

Defendants object to Question 244 as irrelevant
F. 1197 and immaterial and incompetent, the record is the best evidence of what was testified to.

The same objection to Question 245, and we move to strike out all of the answer after the word "yes" as not responsive to the question and giving the conclusion ofthe witness.

Defendants object to Question 246 as irrelevant and immaterial to the issues presented upon the special pleas, as incompetent and calling for the opinion and conclusion of the witness and not for facts.

The same objection to Question 247, and we move to strike out all of the answer after the word "yes" as not responsive to the question and incompetent.

Defendants object to Question 248 as irrele-
F. 1198 vant and immaterial and incompetent as calling for the conclusion of the witness as to matter which she was manifestly unable to testify to as a matter of fact, and we move to strike out the answer of the witness on the same gounds.

Defendants object to Question 249 as irrelevant and immaterial to the issues presented upon the special pleas as incompetent in calling for the opinion and conclusion of the witness and not a fact.

Same objection to Question 250.

Same objection to Question 251.

Defendants object to Question 252 as irrelevant and immaterial to the issues presented upon the special pleas,

as incompetent in calling for the opinion and conclusion of the witness and not for the facts.

Defendants object to Question 253 as improper in form and leading, and irrelevant and immaterial to the issues presented upon the special pleas, and as incompetent and calling for the opinion and the conclusion of the witness; and we move to strike out all after the words "I was absent" as not responsive to the question and as irrelevant and immaterial and incompetent.

Mr. Bovee: Unless Mrs. Reynolds further testi-
F. 1199 fied in this record that is the end of her direct examination.

Mr. Sherman: Question 253 is the last one.

Mr. Bovee: How about Mrs. Reynolds' cross-examination?

Mr. Sherman: I will have her here this afternoon.

Mr. Bovee: At two o'clock?

Mr. Sherman: Two or half past two.

Mr. Bovee: Mr. Sherman, I suppose it is understood that the examination of Mrs. Reynolds will come in after the objections in the record and not be broken into by the examination of Miss Fayerweather?

Mr. Sherman: Certainly.

F. 1200

Continuation of the direct-examination of *EMMA S. FAYERWEATHER.*

Mr. Sherman: I will now ask the witness to answer Question 154, it having been sustained by the Court.

By Mr. Sherman:

154 Q. On the 16th day of March, 1891, or prior thereto, did you have any information that one Henry B. Vaughan, was in Mr. Fayerweather's company at his home on the morning of the day of his death, and that Mr.

Vaughan some desire that there should be another codicil executed, and that there should be in that codicil several provisions which were taken down by Mr. Vaughan upon the back of an envelope which he had with him, and that Mr. Vaughan thereupon went to the office of Arnoux, Ritch and Woodford, and after remaining there an hour or so, came away therefrom in company with two of Mr. Ritch's clerks, with a proposed codicil drawn up in the handwriting of Stewart L. Woodford, whereby the previous will and codicils of Mr.
F. 1201 Fayerweather purported to be altered in this respect, that is to say, by reaffirming and redeclaring the first codicil to Mr. Fayerweather's will, whereby Mr. Bulkley and Mr. Ritch were made residuary legatees in form absolutely, and further altering that disposition of his residuary estate by including Mr. Henry B. Vaughan as an equal legatee with them in the residuary estate, or that Mr. Vaughan and these two clerks came to Mr. Fayerweathers's house, got into his room, and in some manner, without explaining to Mr. Fayerweather the difference between the said proposed codicil and the instructions with which Mr. Vaughan had left the house, procured Mr. Fayerweather's name to be attached to the codicil?

F. 1202 A. No, sir.

155 Q. What information had you as to what your rights were at the time you executed the power of attorney to settle the contest on or about the 16th of March, 1891?

Mr. Bovee: Defendants object to the question as irrelevant and immaterial to the issues presented upon the special pleas.

A. I did not understand that I had any right.

156 Q. Did anyone ever tell you that there was a trust in favor of the institutions in the ninth clause of Mr. Fayerweather's will, and that the residuary devise to Messrs. Ritch and Bulkley, and afterwards to Mr.

Vaughan, was made with the intention on Mr. Fayerweather's part that the residuary estate should also go to the institutions in the ninth clause of his will?

Mr. Bovee: Defendants object to the question as improper in form, as leading, as calling for the conclusion of the witness, as irrelevant and immaterial to the issues presented upon the special pleas.

No, sir.

157 Q. Did any one ever tell you that that scheme was a violation of the Statute of Wills of the State
F. 1203 of New York, and that, notwithstanding the scheme, the residuary estate passed to Mrs. Fayerweather and to you and your two sisters as if no will had been made?

Mr. Bovee: Same objection to that question.

A. No, sir.

158 Q. That residuary estate amounting to about three millions of dollars, did any one ever convey to you the information when you executed your power of attorney to authorize the release and settlement that you were giving away five hundred thousand dollars or thereabouts that belonged to you under the laws of the State of New York?

Mr. Bovee: Same objection.

F. 1204 A. No, sir.

159 Q. Did you know what the law of the State of New York in reference to wills was?

Mr. Bovee: Defendants object to the question as irrelevant and immaterial to the issues presented upon the special pleas, as incompetent, and that everybody is presumed to know the law.

A. No, sir.

Mr. Sherman: Judge Lacombe says that residents of other states are not, he has said so in this case.

160 Q. Did you understand that it was open to you to make a contest and insist upon your rights in reference

to the estate of Mr. Fayerweather independently of Mrs. Fayerweather's contest?

Mr. Bovee: One moment. Defendants object to the question as improper in form and leading, and irrelevant and immaterial to the issues presented by the special pleas, and incompetent.

A. No, sir.

161 Q. The letter in which Mr. Beardsley conveyed to you the proposal of settlement, about when was that dated?

F. 1205 Mr. Bovee: We object to this question as incompetent, the letter is the best evidence of what it contains; and we object to the matter as irrelevant and immaterial to the issues presented upon the special pleas.

A. As near as I can remember it was in March of 1891.

162 Q. When did you last see that letter?

A. Why I have not seen it for ten years.

163 A. What became of it so far as you know?

Mr. Bovee: Defendants object to the question as irrelevant and immaterial.

A. I think it must have been destroyed.

164 Q. State as nearly as you can the substance of it?

Mr. Bovee: One moment. Defendants object
F. 1206 to the question as irrelevant and immaterial to the issues presented upon the special pleas, incompetent, calling for the contents of a written paper, the paper being the best evidence.

A. Well, the nearest I can remember is that they said Aunt Lucy had made arrangements to settle.

Mr. Bovee: One moment. Add to my objection, not the best evidence. Excuse my interrupting you.

The Witness: But that he had made arrangements that he could get us thirty thousand dollars each for my sister, Mrs. Achter, and I, this would be clear over and above attorney fees and he thought that would be the best

we could do and advised us to accept it; but the words he used I cannot remember, the exact words.

165 Q. Well, is that all of the substance of the letter?

A. To the best of my recollection that is.

166 Q. Of what state was your sister, Mrs. Achter, a citizen on the 29th of June, 1897?

A. Muscatine, Iowa.

167 Q. Was she a citizen of the State of Iowa?

A. Yes, sir, Iowa?

168 Q. She was born in Iowa?

F. 1207 A. Yes, sir.

169 Q. And her husband Mr. Achter, was a resident of Iowa when she married him?

A. Yes, sir.

170 Q. Do you know whether Mrs. Achter had any better or other means of knowing about this estate or about any of the matters I have inquired of from you than you had?

Mr. Bovee: One moment. We object to the question as irrelevant and immaterial to the issues presented upon the special pleas, incompetent, calling for the opinion and the conclusion of the witness. The witness cannot speak as to the understanding of Mrs. Achter.

A. She had no better opportunity of knowing F. 1208 than I.

171 Q. To what extent, if at all, did she get such information as she had from you directly?

Mr. Bovee: Defendants object to the question as incompetent, irrelevant and immaterial to the issues presented upon the special pleas, and as incompetent.

A. Why the most of it she got from my telling her by word of mouth.

175 Q. Had you exchanged freely your views and information prior to the 16th of March in reference to the whole matter?

Mr. Bovee: Objected to as incompetent, irrelevant

and immaterial, and calling for the opinion and conclusion of the witness.

A. Yes, sir.

Mr. Sherman: You may cross-examine.

Mr. Bovee: On behalf of the defendants, parties to this proceeding, excepting the defendants Bulkley and Vaughan, I shall proceed with the cross-examination of this witness, but protest against being compelled to cross examine upon matters which are irrelevant to the issues raised by the special pleas. In cross-examining
F. 1209 the witness such defendants do not waive their objection that such matter is irrelevant and immaterial. They make cross-examination and insist that it is in the nature of a *de bene esse* examination conditioned upon the Court holding that the direct examination of the witness is relevant and material. Before proceeding with the cross-examination they repeat the tender of the stipulation to strip the case of all irrelevant and immaterial matter, meaning by that matter which is irrelevant to the only issue which they understand to be before the Court, that of estoppel by the judgment of Amherst College, and others against Ritch which they have pleaded in bar,
F. 1210 and before proceeding with the examination defendants move upon the record to strike out such testimony of the witness as irrelevant and immaterial to the issue. The cross-examination is not as to the defendants, Bulkley and Vaughan. The cross-examination as to those defendants is reserved for Mr. Parsons who is unavoidably absent, being engaged in the trial of a case in the Supreme Court, to wit, the Plant will case.

The cross-examination is not made as to the defendant Hamilton College.

Mr. Sherman: Counsel for complainants does not accept the limitation sought to be placed upon the cross-

examination by the statement of the counsel for the defendants.

Cross-examination by Mr. Bovee:

177 xQ. Where is your present residence Mrs. Fayerweather?

A. Seattle, Washington.

174 xQ. How long have you been in the City of New York?

F. 1211 A. All this year.

175 xQ. Since the 1st of January?

A. Yes, sir.

176 xQ. And how long had you been here prior to that continuously? A. One day.

177 xQ. You came here directly from Seattle, Washington, No, sir.

178 xQ. From where did you come?

A. I stopped at Muscatine, Iowa.

179 Q. Is that where your sister, Mrs. Achter is now living?

A. No, sir; she is not living there now.

180 xQ. Where does she now live?

A. Chicago.

F. 1212 181 xQ. That is her home?

A. Well, that is where she is living; she always calls Muscatine her home.

182 xQ. Where does she live in Chicago?

A. On 54th street.

183 xQ. Are you able to give the number?

A. 229 East 54th street.

184 xQ. But you understand that her residence is in Muscatine, Iowa, is that right?

A. That is what they always call it—their residence and their home.

185 xQ. When did you last see Daniel B. Fayerweather?

A. I cannot give a correct answer, it is three or four years before he died.

186 xQ. It was at least three or four years before his death, was it? A. Yes, sir.

187 xQ. Were you present at his funeral?

A. I was not.

188 xQ. Was Mrs. Achter? A. No, sir.

189 xQ. You father was not living at that time?

A. No, sir.

190 xQ. Where was it that you last saw him?

F. 1218 A. At his home, 11 East 57th street.

191 xQ. Was that the occasion of a visit to Mr. Fayerweather by you. A. Yes, sir.

192 xQ. How long were you there, how long did you visit?

A. As near as I can recollect, about a week.

193 xQ. About one week? A. Yes, sir.

194 xQ. Did you at the same time visit Mrs. Beardsley?

A. Yes, sir.

195 xQ. At Bridgeport, Connecticut?

A. Yes, sir.

196 xQ. She was your sister?

A. Yes, sir.

197 xQ. Did the week that you spent with Mr.

F. 1214 Fayerweather embrace all of the time that you spent in the East at that time?

A. No, that was between — I thought you asked for Uncle Daniel's alone. I was about a week here in New York, and then the time I spent with my sister was, of course, longer than that week.

198 xQ. How much time did you spend with your sister? A. I could not say.

199 xQ. Was it a week?

A. Yes, I should think more than a week.

200 xQ. Was it two weeks?

A. I should say it was, as near as I can recollect.

201 xQ. Was your sister Mrs. Achter with you?

A. No, sir.

202 xQ. Are you able to say when your sister Mrs. Achter last saw Mr. Fayerweather?

A. No, I cannot.

203 xQ. Will you permit me to ask how old you were when Mr. Fayerweather died in 1890?

A. That was eleven years ago?

204 xQ. The 15th of November, 1890, eleven years ago.

A. Thirty-one.

205 xQ. Thirty-one.

F. 1215 A. I am 42 now; I guess that will make it 31.

206 xQ. So that you were about 27 years old when you visited him on the occasion that you have testified?

A. I should judge so.

207 xQ. Prior to that visit when had you been at his house?

A. I have been East visiting uncle a number of times.

208 xQ. Will you be kind enough to tell me the last time you went to his house prior to that visit that you testified to?

A. I cannot tell you. I cannot recollect.

F. 1216 209 xQ. What is your best recollection about how many years ago?

A. Not more than two.

210 xQ. Not more than two? A. No.

211 xQ. Do you know what time in the year it was?

A. No, I cannot remember.

212 xQ. What time in the year was it when you made your last visit that you referred to?

A. I think it was in winter, but I am not sure.

213 xQ. You are not sure? A. No.

214 xQ. How long did you remain on the visit that you made preceding that one?

A. About a week.

215 xQ. Are you sure about that?

A. I could not say positively.

216 xQ. When was it that you went to school from his house, that you have testified to upon your direct examination; how long before his death?

A. That was either in 1879 or 1880.

217 xQ. 1879 or 1880?

A. Yes, sir; I cannot say positively which year.

218 xQ. I understand you to say that you did go to school from his house?

F. 1217 A. Yes, sir.

219 xQ. A private school or a public one?

A. Private.

220 xQ. Do you know by whom that school was kept?

A. Yes, sir.

221 xQ. Who? A. By Mrs. Roberts and her daughter.

222 xQ. Where was the school located?

A. I think it was on 56th street. I cannot say positively.

223 xQ. Between what avenues?

A. Fifth Avenue and Sixth.

224 xQ. Between Fifth and Sixth? A. Yes.

225 xQ. Have you refreshed your recollection

F. 1218 since your last examination as to the school and its whereabouts?

A. No, sir.

226 xQ. Did you not testify upon your direct examination that you did not know where the school was or who kept it? A. No, sir.

277 xQ. How long did you remain at that school?

A. About three months.

228 xQ. What time of the year did you come to New York, winter or summer or when?

A. Fall.

229 xQ. Did your attendance at the school begin with the opening of the fall term?

A. I cannot recollect that, it must have, I think.

230 xQ. In any event you remained and continued to go to school there but for a period of three months?

A. That is all.

231 xQ. Are you sure, Mrs. Fayerweather, that you attended this school or that you had an instructor at the house?

A. I attended the school.

232 xQ. You are positive about that, are you?

A. Yes, sir.

F. 1219 233 xQ. Was your sister, Mrs. Achter, with you?

A. No, sir.

234 xQ. Is she a younger or an older lady than you?

A. Older.

235 xQ. What is the difference in your ages?

A. A trifle over two years.

236 xQ. How many visits did you make to Mr. Fayerweather's house between the time that you went to school, as you have testified to, and his death, that you can positively recall?

A. I do not feel that I can say positively how many times, but I do not think it was longer than two years apart, from the time until he died that I was

F. 1220 there until the last. I used to go East about every two years.

237 xQ. Can you specify any one year after that school visit in which you can positively say that you were at Mr. Fayerweather's house?

A. I cannot.

238 xQ. Is your recollection so distinct as to any one year by which you can say in what season of the year you were there?

A. I think it has always been in the winter, except this time of going to school, which was in the fall.

239 xQ. Mrs. Beardsley was your sister?

A. Yes, sir.

240 xQ. I understand you to say that you were present during a part of the contest in Surrogate's Court in New York in 1891? A. Yes, sir.

241 xQ. Were you any part of the time at the house of Mrs. Fayerweather in 57th street?

A. Yes, sir.

242 xQ. How many days during that contest were you at Mrs. Fayerweather's home?

A. Two or three days.

243 xQ. Was it at the beginning of the con-
F. 1221 test or towards the close?

A. At the beginning.

244 xQ. In the month of January or the month of February?

A. It must have been January, to the best of my recollection.

245 xQ. Were you three days continuously at the home of Mrs. Fayerweather?

A. I said it was two or three, I am not sure which.

246 xQ. Whatever the time was, you were continuously at the house, is that correct?

A. Yes, sir.

247 xQ. That is, you were not going forwards and backwards and up to Judge Beardsley's house?

F. 1222 A. No, sir.

248 xQ. The rest of the time that you were East was spent at the home of Judge Beardsley, was it?

A. Yes, sir.

249 xQ. At Bridgeport, Connecticut?

A. Yes, sir.

250 xQ. How many days did you spend with Judge Beardsley?

A. I can't remember.

251 xQ. Was it a week? A. Yes, sir.

252 xQ. Two weeks?

A. As near as I can recall it was about a month.

253 xQ. About a month? A. Yes, sir.

254 xQ. Was that after you had spent the two or three days with Mrs. Fayerweather, or before?

A. The two or three days spent in New York were between the visits.

255 xQ. Between the visits. Then when you came East you first went to the house of Judge Beardsley?

A. Yes, sir.

256 xQ. You then came to Mrs. Fayerweather's house and spent two or three days, and then returned to Judge Beardsley's house, and from there you returned

F. 1223 to your home in the West, is that right?

A. Yes, sir.

257 xQ. Tell me as near as you can the day when you arrived at New York and went to Judge Beardsley's house?

A. I cannot give you the correct date, but it was before Christmas.

258 xQ. It was before Christmas? A. I think so.

259 xQ. And it was in the month of December, 1890?

A. Yes, sir.

260 xQ. What is your best recollection as to how long after the death of Mr. Fayerweather on the 15th of November you arrived here?

A. I should say five or six weeks.

F. 1224 261 xQ. Five or six weeks after the death of Mr. Fayerweather?

A. Yes, five weeks fully.

262 xQ. How long did you remain, were you with the Beardsley family, after you had spent the three days with Mrs. Fayerweather?

A. Not very long.

263 xQ. Well, what is your best recollection, if you please?

A. Not more than a week if it was a week.

264 xQ. While you were at the Beardsley house did you from time to time come to the City of New York?

A. Not only on that one occasion.

265 xQ. Do I understand you to say that you came to New York but on one occasion during all the time you were visiting Judge Beardsley's house?

A. At that time.

266 xQ. Who came with you then?

A. Mrs. Beardsley and Mr. Beardsley were down each day, I think.

267 xQ. When you came down with Mrs. Beardsley on the occasion that you have indicated, did you and Mrs. Beardsley and the Judge go to the Surrogate's

F. 1225 Court?

A. Yes, sir.

268 xQ. And it was upon that occasion that you saw the trial progressing?

A. Yes, sir.

269 xQ. Over the contest of the will?

A. Yes, sir.

270 Q. You saw Mr. Coudert on that occasion, did you?

A. I did not meet him.

271 xQ. You saw him?

A. I have no recollection of seeing him, but I no doubt did see him in the Court room.

272 xQ. And did you understand he was the counsel for Mrs. Fayerweather in the proceeding?

F. 1226 A. Yes, sir.

273 xQ. You saw Judge Rollins?

A. Yes, sir.

274 xQ. You understand that he was the gentleman who was representing your interest and that of your sister, Mrs. Achter? A. Yes, sir.

275 xQ. You met Judge Rollins? A. Once.

276 xQ. Is that the occasion that you came to New York with Mrs. Beardsley and Judge Beardsley that you have referred to, that you met him? A. Yes, sir.

277 xQ. Where was that you met him, Madam?

A. At his office.

278 xQ. Where was that? A. At his private office.

279 xQ. Is it not your recollection, Madam, that he did tell you that he had been to the contest?

A. I suppose he talked about it when he got home.

280 xQ. What time of the day was that?

A. Early in the morning before the Court opened.

281 xQ. And upon that occasion he went from the office to the Court, did he?

A. As near as I can recall he did. Mr. Beardsley took me there.

F. 1227 282 xQ. Did you go with him?

A. Not with Judge Rollins.

283 xQ. Judge Rollins went alone and you and Judge Beardsley followed, is that right? A. Yes, sir.

284 xQ. I understand you to say that Judge Beardsley was coming to New York daily, is that correct, while you were at his house?

A. No, while I was in the City of New York.

285 xQ. While you were stopping at the Beardsley house did Judge Beardsley come to the City of New York to your knowledge?. A. He did.

286 xQ. He did? A. I think so.

287 xQ. And, as you understood, for the purpose of attending this trial?

F. 1228 A. I do not remember of his coming to the trial, except when we were down here.

288 xQ. Didn't Judge Beardsley on the occasion when he would go to New York report to you upon his return that he had been to the will contest, and in a general way tell you of the progress of the case? A. Yes.

290 xQ. You were deeply interested in the matter at that time, were you not?

A. In one sense of the word I was, but I left the matter to him to look after it for me, I knew nothing about the laws.

291 xQ. With him and your counsel, Judge Rollins.

A. Yes, sir.

292 xQ. You understood that Judge Rollins was a gentleman who had very extensive experience in matters of that character, did you not?

A. I supposed he was, or Mr. Beardsley would not have engaged him.

293 xQ. The engagement and retainer of Judge Rollins in your behalf was through Judge Beardsley, was it?

A. It was.

294 xQ. You understood that Judge Rollins had been a Surrogate and Probate Judge in this County, did

F. 1229 you not?

A. I suppose I was told of it at the time.

295 xQ. Well, it was your understanding that he was aman of wide experience in matters pertaining to the probate of wills, was it not?

A. I suppose I was told those things, but I paid no attention to those matters, I simply let Mr. Beardsley do just as he chose in the matter.

296 xQ. And you entrusted your interests to Mr. Beardsley? A. Entirely.

297 xQ. Now having the interest that you did in that controversy you naturally sought information, did you not, from Judge Beardsley from time to time in respect to the progress of the contest?

F. 1230 A. No, I would not call it that.

298 xQ. Was it not a matter of frequent and common discussion in the household between you and Judge Beardsley and Mrs. Beardsley in reference to the progress of the case?

A. The matter was spoken of, but as I say, it was a matter I understood nothing about, and of course I did not understand that I could comprehend it, and I left the matter entirely with Judge Beardsley.

299 xQ. Well, now, have you visited the Beardsley house since you have been in New York on this occasion. A. No, sir.

300 xQ. Have you been to Bridgeport since the 1st of January? A. No, sir.

301 xQ. Has Mrs. Beardsley visited you at the Fayerweather house? A. Yes, sir.

302 xQ. You have been stopping at the home of Mrs. Reynolds since you have been in New York this year, have you not?

Mr. Sherman: Objected to because it involves a conclusion as to where the home of Mrs. Reynolds is and does not specify any place.

F. 1231 A. I have been stopping at 11 East 57th street.

303 xQ. That is the home of Mrs. Reynolds?

Mr. Sherman: I object to that as incompetent and calling for a conclusion.

A. I do not know whether it is her home or not; it is where she is at present.

303 xQ. Is it the home of Mr. Reynolds?

Mr. Sherman: Same objection.

A. I do not understand it so.

305 xQ. He lives there, don't he?

Mr. Sherman: Objected to as immaterial as evidence at large in the cause.

A. He has been there since I have been there.

306 xQ. Do I understand you to say that Mrs.

F. 1232 Beardsley has been at 11 East 57th street to see you since the 1st of January?

A. Yes, sir.

307 xQ. And you have had intercourse and conversation with her, have you not?

A. I have.

308 xQ. How many times has she visited you?

Mr. Sherman: Objected to as immaterial and as evidence at large in the cause.

A. Four or five times.

309 xQ. Four or five times. A. Yes.

310 xQ Has Judge Beardsley been with her on any occasion?

Mr. Sherman: Same objection, and on the further ground that this is not cross-examination of any matter inquired of in chief.

A. Mr. Beardsley did not come with her.

311 xQ. He came separately, did he?

A. He did.

312 xQ. On how many occasions?

Mr. Sherman: Same objections.

A. I have seen him once.

313 xQ. You have seen him once.

F. 1233 A. Yes, sir.

314 xQ. Has he been there to see you on not more than one occasion? A. No, sir.

315 xQ. Did he upon that occasion when you saw him spend the night at 11 East 57th street?

Mr. Sherman: Objected to as immaterial, and on the ground that it has no tendency to establish any matter set up as a bar based upon the judgment in Five College action to inquire whether Judge Beardsley on any occasion spent the night in 57th street.

A. He did not.

316 xQ. His wife has spent the night there since you have been in New York?

Mr. Sherman: Same objections.

F. 1234 A. Yes, sir.

317 xQ. Did you testify upon the probate contest, Mrs. Fayerweather? A. No, sir.

318 xQ. Did you, pending the contest, have in contemplation or in view the giving of any testimony?

A. No, sir.

319 xQ. While you were at the Fayerweather house on the two or three days that you have mentioned you were in constant communication with Mrs. Fayerweather, were you not?

A. We saw each other every day.

320 xQ. And during the evening?

A. Yes, sir.

321 xQ. And the subject of the probate contest was the subject of general discussion and consideration between you, was it not?

Mr. Sherman: Objected to on the ground that the question inquired of, if it has any legal tendency, has a tendency to establish some matter of laches or estoppel and not in any wise to illustrate the character, scope, bearing or effect of the judgment of the State Courts in the action brought by Amherst College against Ritch and as being, therefore, evidence at large in the
F. 1235 cause as to which these defendants have no pleading which justifies them in going into evidence at large in the cause; as otherwise incompetent, immaterial and irrelevant.

The subject was spoken of, but not but very little.

322 xQ. Did you on any occasion during that visit see Mr. Holden at the house?

A. No, sir.

323 xQ. Did you know who Mr. Holden was?

A. No, sir.

324 xQ. Did you not know that he was associated with Mr. Coudert as counsel in the will case?

Mr. Sherman: Same objections, and the further objection that the defendants can take no advan-
F. 1236 tage from evidence at large in the cause except such as is responsive to a pleading setting up the matters inquired of, and that inasmuch as these defendants have filed no such pleading the only effect of going into evidence at large in the cause is to overrule their plea.

(At the request of the witness Question No. 324 was repeated by the stenographer.)

A. No, sir.

325 xQ. Your brother-in-law, Judge Beardsley, has been a Probate Judge in the State of Connecticut, has he not?

A. Yes, sir.

326 xQ. And for how many years? A. I don't know.

Mr. Sherman: Objected to as immaterial.

327 xQ. At the time of the contest over the will of Mr. Fayerweather he had had experience as Probate Judge, had he not?

Mr. Sherman: Objected to as incompetent and immaterial.

A. He had been Judge of Probate.

328 xQ. For how many years at that time, do F. 1237 you know?

Mr. Sherman: Same objection.

A. I cannot say.

329 xQ. Where was it that you executed the power of attorney, in New York or in the West, the power of attorney to Judge Beardsley?

Mr. Sherman: Objected to on the ground that the power of attorney appears by the record to be in the possession and control of the examining counsel and his clients and that he has refused to produce it on demand, and is therefore not entitled to make any inquiry concerning it as to its contents, and I, therefore, advise the witness to decline to answer.

The Witness: Under advice of counsel I de-

F. 1238 cline to answer.

330 xQ. After you conferred the power of attorney to which you have referred in your direct examination, what did you do with that paper?

Mr. Sherman: I give the witness the same advice for the same reasons.

The Witness: On advice of counsel I decline to answer.

Mr. Bovee: I will wait, until the powers of attorney are produced and then I will continue my cross-examination, and determine whether I shall have this matter settled by the Court or not.

Mr. Sherman: The sooner you try to settle it by

the Court the better I shall be pleased. If you can withhold a paper and cross-examine about it, I want to find it out just as soon as possible. Can't you go on with something else for a while?

Mr. Bovee: Yes.

331 xQ. How long have you known John B. Reynolds?

A. Ten years.

332 xQ. Since 1891? A. Yes, sir.

333 xQ. When did you first make his acquaintance and where?

F. 1239 A. In the fall of 1891.

334 xQ. Where? A. Rutland, Vermont.

335 xQ. Was he at that time the husband of Mrs. Reynolds? A. Yes, sir.

236 xQ. Did you on that occasion pay a visit to his wife Mrs. Reynolds?

A. Yes, sir.

337 xQ. And you came there upon her invitation or his?

A. Her's I think — I have never considered that it was necessary to wait for an invitation to visit any of the family, I have always visited them whenever I wanted to.

338 xQ. Was Mrs. Reynolds a member of the family of Mr. Fayerweather?

F. 1240 A. She was.

339 xQ. A blood relative of Mr. Fayerweather?

A. Not of Mr. Fayerweather.

340 xQ. How many visits have you paid to Mr. and Mrs. Reynolds since the death of Mr. Fayerweather?

A. Two or three.

341 xQ. Were you here in 1894 when the case of Amherst *vs.* Ritch was tried?

A. No, sir.

34a xQ. Where were you at that time?

A. I cannot remember.

343 xQ. How long did you remain with Mrs. Reynolds in 1891 in Rutland, Vermont?

A. A few days.

344 xQ. Is that the best answer you can give me?

A. Yes, sir.

345 xQ. Was it a week?

A. No, it was not a week.

346 xQ. Was it five days.

A. It must have been three or four days.

347 xQ. It must have been three or four days?

A. Yes.

348 xQ. That was before the death of Mrs.
F. 1241 Fayerweather, was it?

A. Yes, sir.

349 xQ. How long before?

A. I was mistaken, it was not 1891, it was 1892.

350 xQ. Ah, a year later? A. Yes, sir.

351 xQ. Then it was after the death of Mrs. Fayerweather? A. Yes, sir, it was.

352 xQ. In what month?

A. I do not remember the month.

35s xQ. May you not have been mistaken as to whose invitation it was, on whose invitation it was that you came to Rutland on that occasion?

Mr. Sherman: Objected to as utterly immaterial.

A. I do not not understand that I had any in-
F. 1242 vitation.

354 xQ. You came there without any suggestion from any of the Reynolds family?

A. I do not recall any suggestion.

355 xQ. During that visit at Rutland, Vermont, was the subject of Fayerweather litigation discussed bstween you and Mr. John B. Reynolds.

A. It was spoken of.

356 xQ. Frequently? A. Yes.

357 xQ. Did he advise your beginning any proceedings?

Mr. Sherman: That is objected to on the ground that it relates to no issue presented by the defendants, as irrelevant and immaterial and incompetent and privi-

ledged; and upon the ground of privilege I advise the witness not to answer.

The Witness: On the advice of counsel I decline to answer.

358 xQ. Did you understand that John B. Reynolds was a lawyer? A. No, sir.

359 xQ. Did you understand that he was a physician. A. No, sir.

360 xQ. Or that he was a minister?

A. No, sir.

F. 1243 361 xQ. Upon what ground of privilege do you claim that you should not answer the question?

Mr. Sherman: Objected to on the ground that the privilege will be defined by the counsel to the witness. The witness is under no obligation to define it. Counsel for complainants states as the ground that, as he is advised, the witness has had no communication on the subject inquired of with John B. Reynolds, except such as related to the employment of counsel learned in the law, and only as the agent or intermediary between this witness and such counsel, and offers to support that ground of objection by proof; and thereupon advises the witness to decline to answer.

The witness: Under advice of counsel I de-

F. 1244 cline to answer.

362 xQ. Have you at any time signed any paper or agreement between yourself and John B. Reynolds relating to the prosecution of any suits over the estate of Mr. Fayerweather?

Mr. Sherman: I repeat all the objections to this question previously stated, and upon the same ground I advise the witness to decline to answer.

The Witness: Under advice of counsel I decline to answer.

363 xQ. Do you hold any contract or agreement with John B. Reynolds, or does he hold any contract or agree-

ment with you, respecting the prosecution of this suit or of any other suits relating to the Fayerweather estate?

Mr. Sherman: I make the same objections and give the witness the same advice.

The Witness: Upon advice of counsel I decline to answer.

364 xQ. When did you first make the acquaintance of Mr. William Blaikie?

A. 1892.

365 xQ. At the same time that you made your F. 1245 visit tothe Reynolds at Rutland, Vermont?

A. Yes, sir.

366 xQ. You met him there? A. Yes, sir.

367 xQ. Was Mrs. Achter with you? A. Yes, sir.

388 xQ. Is she in the City of New York at present?

A. No, sir.

366 xQ. Was she in New York during the will contest?

A. No, sir.

370 xQ. Was she in New York during the trial of Amherst *vs.* Ritch in 1894?

A. No, sir.

371 xQ. You knew, did you not, Mrs. Fayerweather, that in 1892, Mrs. Fayerweather began a suit in the Supreme Court?

F. 1246 A. I knew she began a suit, but I do not understand the Courts.

372 xQ. And you were afterwards made one of the plaintiffs in that action, were you not?

A. That is the way I understand it.

373 xQ. And you understood that that action was revived by Mr. Reynolds as executor of Mrs. Fayerweather?

A. Yes, sir.

374 xQ. And you were joined as one of the plaintiffs?

A. Yes, sir.

375 xQ. And your sister Mrs. Achter also?

A. Yes, sir.

376 xQ. That was with your knowledge, Mrs. Fayerweather, your being made a party to that suit?

A. Yes, sir.

377 xQ. Did the first information that you had with reference to the pendency of that action come to you from John B. Reynolds?

A. Yes, sir.

378 xQ. And was it at his instance that you and Mrs. Achter became plaintiffs with him?

Mr. Sherman: Objected to as calling for the
F. 1247 conclusion of the witness and not for any legal proofs of any matters of fact.

A. Yes, sir.

379 xQ. Where was that suggestion made to you, Mrs. Fayerweather?

Mr. Sherman: Same objection.

A. Rutland, Vermont, to the best of my recollection.

380 xQ. On the occasion of this visit that you have referred to. A. Yes, sir.

381 You understood that Mr. Blaikie was the attorney of record in that suit, did you not?

A. Yes, sir.

382 xQ. (Handing paper) Look at the paper
F. 1248 which I now show you and tell me if you recognize that as the complaint in that action?

Mr. Sherman: Counsel for the complainants objects to the protracted examination which has occurred at the instance of counsel for the defendants of matters having no relevancy whatever to the special plea, and which, if it have any legal tendency, relates to matters at large in the case, and which has no possible excuse or pretext in a *de bene esse* or provisional cross-examination inasmuch as those matters have not been inquired of in chief; and insists that the defendants, having availed themselves of this opportunity to exploit the case of the complainants at large, shall here-

after be held to the strict rule in regard to the proof at large in the cause, after having filed a plea, and shall not be permitted after exploiting the complainants' case to strike out the evidence upon the pretext that it was provisional cross-examination, but insists that hereafter and that at all times and places the defendants shall be held to the legal rule, that they have overruled their plea by going into evidence at large with full notice, and that they are entitled to no benefit from the proof at large inasmuch as it is
F. 1249 not responsive to any pleading filed by them.

(At the request of the witness Question No. 382 was repeated by stenographer.)

A. As near as I understand law I should say it was. I know very little about law in any shape.

383 xQ. I understand, Madam. You have told us that.

A. So I cannot state correctly, you know, or definitely, because I know so little about it.

Mr. Bovee: I ask to have that marked for identification.

Mr. Sherman: It has already been marked.

Mr. Bovee: The paper shown witness is Com-
F. 1250 plainants' Exhibit 3 for Identification, February 5th, 1901.

384 xQ. The action of Mr. Reynolds in prosecuting that suit and having that complaint filed, was with your approval, was it not?

A. Yes, sir.

385 xQ. And that of your sister, Mrs. Achter?

A. Yes, sir.

386 xQ. The complaint was seen by you at or about that time, was it not, when it was filed?

A. Yes, sir

387 xQ. Sent to you in the West?

A. Yes, sir.

388 xQ. And you subsequently understood that that suit had been dismissed, did you?

A. I suppose I did.

389 xQ. And you so learned frem Mr. Reynolds?

Mr. Sherman: Objected to on the ground that it is not a competent mode of proof, that the law requires that the matter inquired of shall appear as a matter of record, which is the best evidence.

A. Yes, sir.

390 xQ. When did you first learn of the com-
F. 1251 mencement of the suit of Amherst College and others against Ritch?

Mr. Sherman: Objected to as immaterial.

A. I cannot give you the date, I do not remember.

391 xQ. Was it in 1893 or 1894?

A. I cannot remember.

392 xQ. And such information as you received came to you from Mr. Reynolds?

A. Yes, sir.

394 xQ. In a personal interview or letter?

A. I do not recollect.

395 xQ. Where were you when you received that information?

A. I could not say.

F. 1252 396 xQ. Were you in the City of New York?

A. No, sir.

397 xQ. Were you in the West?

A. I was in the West.

398 xQ. Do you remember Mr. Reynolds coming to see you in the West?

A. Yes, sir.

399 xQ. More than once? A. Yes, sir.

400 xQ. How many times? A. Two or three times.

401 xQ. On such occasions he came to see you with reference to these matters, did he? A. Yes, sir.

402 xQ. Mr. Blaikie was your attorney in the case of Amherst *vs.* Ritch, was he not?

A. Yes, sir.

403 xQ. And Colonel Edward C. James was your counsel?

A. I believe so.

404 xQ. By whom was Mr. Blaikie retained in that action on your behalf?

Mr. Sherman: Objected to on the ground that the evidence is wholly immaterial and irrelevant, and as privileged, on which ground I advise the witness to decline to answer.

The Witness: On advice of counsel I decline to

F. 1253 answer.

405 xQ. Is is not a fact that Colonel Edward C. James was retained in your interest through Mr. John B. Reynolds in your behalf?

Mr. Sherman: I give the same advice for the same reason?

The Witness: Under advice of counsel I decline to answer.

406 xQ. Is it not a fact that such information as you have received respecting the suit of Amberst *vs.* Ritch, has come to you through Mr. John B. Reynolds?

A. Yes, sir.

407 xQ. Do you remember the answer which you filed in the case of Amherst *vs.* Ritch, Mrs. Fayer-

F. 1254 weather?

A. No, sir.

408 xQ. You did sign your answer? It was sent to the West to you, was it not?

A. I think I did.

409 xQ. Where were you during the trial of Amherst College case in 1894?

A. I could not say.

410 xQ. Mrs. Fayerweather, the trial of Amherst against Ritch was begun on the 24th of January, 1894. Are you able, having your recollection refreshed by that date, to tell me where you were at that time?

A. No, I cannot. Muscatine has always been con-

sidered my home. I have not been there all the while, but that is considered my home.

411 xQ. And is it your best recollection that you were there at that time?

A. I cannot say whether I was there or in Chicago, or near there.

412 xQ. You knew of the pendency of that trial at that time, did you not? A. Yes, sir.

413 xQ. Have you any letters in your possession now which were received by you from Judge Beard-

F. 1255 sley relating to tne will contest and its settlement during the year 1891?

A. If I have, the gentlemen have them here, I have not myself.

414 xQ. Do you know if your counsel has any letters which you received from Judge Beardsley at that period of time?

Mr. Sherman: Objected to on the ground that the inquiry is obviously addressed to ascertain communications between the witness and her counsel, and it is obviously improper and privileged under the Code, on which ground I advise the witness to decline to answer.

The Witness: Upon advice of counsel I decline to answer.

F. 1256 415 xQ. You did receive letters from Judge Beardsley after your return from the West during the will contest, did you not?

Mr. Sherman: Objected to upon the ground that the matter inquired of is privileged, upon which ground I advise the witness to decline to answer.

The Witness: On advice of counsel I decline to answer.

416 xQ. Were there any letters written by you to Judge Beardsley in the same time?

Mr. Sherman: Same advice on the same grounds.

The Witness: On advice of the counsel I decline to answer.

417 xQ. After your return to the West in 1891, and pending the will contest, did you receive any communication from your counsel, Judge Rollins?

Mr. Sherman: Same objection.

A. No, sir.

418 xQ. Was such communication as you did receive through your brother-in-law, Judge Beardsley?

A. Yes, sir.

419 xQ. When was it that you executed the power of attorney to Judge Beardsley?

F. 1257 A. I cannot give you the date.

Mr. Sherman: One moment. Do not answer that. That is objected to on the grounds formerly given for objecting to the inquiry into the contents of writings withheld by the counsel for the defendants, and I repeat the advice which I have given, to decline to answer.

The Witness: On the advice of counsel, I decline to answer.

Mr. Bovee: Bnt you have already answered, Madam.

Mr. Sherman: Well, she need not answer again. Counsel for the complainants calls upon the counsel for the defendants for the third time to produce the power of attorney referred to by him.

F. 1258 Mr. Bovee: Counsel for the defendants states that he has has sent for the powers of attorney and that he expects them here in a short time.

Mr. Sherman: Counsel for the complainants moves to strike out all testimony of this witness regarding the alleged power of attorney on the ground that it is not competent for a party withholding a paper in his power to cross-examine about it or to give secondary evidence of its contents. May I inquire whether you are likely to be very long with this witness? If you are perhaps it will not be necessary to have another witness here this afternoon. If you are likely to be through very soon I will see that you have some more work to do.

TESTIMONY OF E. S. FAYERWEATHER.

Mr. Bovee: We have to go before Judge Lacombe at two o'clock.

Mr. Sherman: That won't take a great while.

Mr. Bovee: I will not be able to conclude with Mrs. Fayerweather to-day, Mr. Sherman.

Mr. Sherman: Do you mean on your part or on the part of Mr. Parsons? Will you be through as far as you are concerned with her cross-examination?

Mr. Bovee: I think so. I shall have to ask for a reservation because I did not expect that Mrs.
F. 1259 Fayerweather would be on the stand to-day, I supposed that Mrs. Reynolds would occupy the day. I will go as far as I can, with a reservation, and if Mr. Parsons can come here he will cover anything further that I may have to ask.

Mr. Sherman: All that fails to inform me whether the time that you are likely to occupy with her will leave enough time to justify our having another witness here this afternoon.

Mr. Bovee: I think if Mrs. Reynolds can come here say at three o'clock I can go on with her until four, until the adjournment.

Mr. Sherman: It is hardly worth while for an hour.

Mr. Bovee: I should not think it was. I think
F. 1260 I can take nearly all the afternoon with Mrs. Fayerweather. I should think it would be hardly worth while to ask Mrs. Reynolds to come down here for that short time, for I certainly could not conclude with her to-day, there is no doubt about that.

At this point a recess was taken until 2 P. M.

AFTER RECESS.

Continuation of the cross-examination of *EMMA S. FAYERWEATHER.*

By Mr. Bovee:

420 xQ. (Handing paper) Look at the paper which I now show you and tell me if the signature F. 1261 to that paper is yours?

A. I should say it was.

421 xQ. It is your signature, is is not, Mrs. Fayerweather?

A. Yes, sir. If it is not it is a very correct imitation.

422 xQ. (Handing paper) Look at the signature of that which I show you and tell me if that is the signature of of your sister, Mrs. Achter?

A. Yes, sir, I should say so.

Mr. Sherman: If you are going to ask the witness about the papers I should like to see them.

Mr. Bovee: I offer in evidence the paper signed F. 1262 Emma S. Fayerweather.

Mr. Sherman: Objected to on the ground that the paper does not purport to confer any authority upon Morris B. Beardsley to execute the releases claimed to have been executed by him and delivered.

The paper was marked Defendants' Exhibit I February 7th, 1901, C. B.

Defendants' Exhibit 1 is as follows:

"Know all men by these presents, thas whereas Dan-

iel B. Fayerweather, late of the City of New York, deceased, by a paper heretofore propounded in the Surrogate's Court for the County of New York as his last will and testament, did bequeath unto me, Emma S. Fayerweather, of Muscatine, in the State of Iowa, a certain money legacy to be paid unto me, and whereas as one of the heirs at law and next of kin of the said Daniel B. Fayerweather, deceased, I did heretofore cause objections to be filed in said Surrogate's Court

to the admission of certain papers propounded
F. 1263 as codicils to said last will and testament; now,

know ye, that I, the said Emma S. Fayerweather, of Muscatine, in the State of Iowa, have made, ordained, constituted and appointed Morris B. Beardsley, of Bridgeport, in the State of Connecticut, my true and lawful attorney for me, and in my name and for my use and benefit to ask, demand and receive of and from Justus L. Bulkley, Thomas G. Ritch and Henry B. Vaughan, the executors of the said Daniel B. Fayerweather, deceased, the legacy given and bequeathed unto me by the said will as aforesaid, together with such additional sum as my said attorney shall deem satisfactory in full settlement of any contest on my

part concerning said estate, and upon receipt
F. 1264 thereof by or payment thereof to my attorney

a general release or discharge for the same to make, execute and deliver, hereby ratifying, confirming and allowing whatsoever my attorney shall lawfully do in the premises.

"And I further authorize my said attorney for me and in my name to authorize the withdrawal of objections to probate heretofore filed in my behalf, and to do whatever else may be necessary to release the estate of the said Daniel B. Fayerweather and his executors from all claims for me or in my behalf.

"In witness whereof, I have hereunto set my hand and seal this 16th day of March, 1891

"(Signed)

Emma S. Fayerweather [seal]

"Signed, sealed and delivered
in the presence of
H. G. Shoemaker.

On this 16th day of March, 1891, before me appeared Emma S. Fayerweather, to me known, and
F. 1265 known to me to be the person described in the foregoing instrument, and she acknowledged to me that she executed the same.

Henry Jayne,
Notary Public,
Muscatine County, Iowa.

(Notary's seal, Henry Jayne, notarial seal.)

(Indorsed Emma S. Fayerweather to Morris B. Beardsley. Power of Attorney. Daniel G. Rollins for———, 32 Nassau street."

423 xQ. That is the power of attorney referred to by you in your direct examination, the paper executed by you on the 16th day of March, 1891, Mrs. Fayer-
F. 1266 weather?

A. Yes, sir.

424 xQ. I notice this paper is indorsed Daniel G. Rollins, your counsel in the probate proceedings. Was that forwarded to you directly by Judge Rollins or by Mr. Beardsley?

Mr. Sherman: Objected to as incompetent. How can she tell?

425 xQ. From whom did you receive it, Judge Beardsley or Judge Rollins?

Mr. Sherman: How can she tell?

Mr. Bovee: Well, permit her to tell.

Mr. Sherman: It is obviously impossible for her in Muscatine to tell who sent her a letter from New York.

Mr. Bovee: Let us see about it.

A. I do not think I could say.

426 xQ. You received it in the mail?

A. Yes, sir.

427 xQ. And you received a letter with it, did you not?

A. I do not remember.

428 xQ. What did you do with it after you F. 1267 executed it?

A. I mailed it to Mr. Beardsley.

429 xQ. Mailed it to Judge Beardsley?

A. That is the best of my recollection.

430 xQ. And your best recollection is that you did receive it from Judge Beardsley, did you not?

Mr. Sherman: Objected to as incompetent.

A. I would suppose so.

431 xQ. Now, Mrs. Fayerweather, what is you best recollection as to when it was you received this paper, how long before the 16th of March, the day on which you executed?

A. I have no very definite recollection.

432 xQ. Well, what is your best recollection, F. 1268 whether definite or otherwise?

A. Oh, I should say it was very close to that time.

433 xQ. How long had you been home from New York at that time?

A. I could not say positively, but I guess, I think must have been home about a month.

434 xQ. You must have been home a month?

A. Yes, sir; but I really could not say.

435 xQ. Then you think you had left New York by the 16th of February, 1891?

A. Yes, sir.

436 xQ. I understood you to say upon your direct

examination that upon the occasion when you went to the Surrogate's Court you saw Lizzie Joyce on the stand and being examined?

A. Yes, sir.

437 xQ. And who else was there that you saw examined?

A. I could not say, I do not recollect.

438 xQ. You have mentioned the names of some other witnesses?

A. Well, I remember the names, but I could
F. 1269 not remember positive enough to say anything positive.

439 xQ. Did you see Mr. Grout upon the stand?

A. I do not recollect it.

440 xQ. Mr. Woodford?

A. I cannot recall any one except Miss Joyce, they were all strange to me.

441 xQ. You knew Miss Joyce?

Miss Joyce was at the house, that was the reason I know her.

442 xQ. And she had been at the house all the time that you had been there, the two or three days that you had been there, had she not?

A. I cannot positively say whether she was or
F. 1270 not.

443 xQ. Was the occasion when you went to the court house one of the three days which you spent at Mrs. Fayerweather's house?

A. Yes, sir.

444 xQ. Was it the first or the last?

A. I came down from Bridgeport in the morning and went to the Court room and at night went up to 57th street house.

445 xQ. And it was upon that day that you saw Lizzie Joyce upon the stand?

A. Yes, sir.

446 xQ. Is it impossible for you to say whether that was in the month of January or the month of February?

A. It is.

447 xQ. Was it upon the same day that you went to the office of Judge Rollins? A. Yes, sir.

448 xQ. Did you not understand that this power of attorney, which has been put in evidence, was prepared by your counsel, Judge Rollins?

Mr. Sherman: Objected to as incompetent and immaterial.

F. 1271 A. I did not know who prepared it.

449 xQ. Was there any reference to a power of attorney in your communications with Judge Rollins upon that subject?

Mr. Sherman: Wait a minute. That is objected to as a violation of the privilege of the Code, and I advise the witness to decline to answer.

The Witness: On the advice of counsel I decline to answer.

Mr. Bovee: I now offer in evidence the power of attorney signed by Mrs. Achter.

Mr. Sherman: Counsel for complainants makes the same objection thereto which he made to the offer in evidence of the power of attorney signed by

F. 1272 the witness.

Mr. Bovee: The paper offered being the same paper, the signature to which is identified by the witness as that of Mrs. Achter, her sister.

The paper was marked Defendants' Exhibit No. 2, February 7th, 1901, C. B.

Defendants' Exhibit No. 2, is as follows:

"Know all men by these presents, that whereas Daniel B. Fayerweather, late of the City of New York, deceased, by a paper heretofore propounded in the Surrogate's Court for the County of New York as his last will and

testament did bequeath unto me, Mary W. Achter, of Muscatine, in the State of Iowa, a certain money legacy to be paid unto me, and whereas as one of the heirs at law and next of kin of the said Daniel B. Fayerweather, deceased, I did heretofore cause objections to be filed in said Surrogate's Court to the admission to probate of certain papers propounded as codicils to said last will and testament; now, know ye, that I, the said Mary W. Achter, of Muscatine, in the State of Iowa, have made, ordained, constituted and appointed Morris B. Beardsley, of Bridgeport, in the State of Connecticut,

my true and lawful attorney for me and in my
F. 1273 name and for my use and benefit to ask, demand

and receive of and from Justus L. Bulkley, Thomas G. Ritch and Henry B. Vaughan, the executors of the said Daniel B. Fayerweather, deceased, the legacy given and bequeathed unto me by the said will as aforesaid, together with such additional sum as my said attorney shall deem satisfactory, in full setttlement of any contest on my part concerning said estate and upon receipt thereof by or payment thereof to my said attorney a general release or discharge for the same to make, execute and deliver, hereby ratifying, confirming and allowing whatsoever my said attorney shall lawfully do in the premises.

"And I further authorize my said attorney for me
F. 1274 and in my name to authorize the withdrawal of ob-

jections to probate heretofore filed in my behalf and to do whatsoever else may be necessary to release the estate of the said Daniel B. Fayerweather and his executors from any and all claims for me or on my behalf.

"In witness whereof I have hereunto set my hand and seal this 16th of March, 1891.

(Signed) Mary W. Achter [Seal]

"Signed, sealed and delivered
in the presence of H. G. Shoemaker.

"On this 16th day of March, 1891, before me appeared Mary W. Achter, to me known and known to me to be the person described in the foregoing instrument. and she acknowledged that she executed the same. Henry Jayne,

Notary Public, Muscatine County, Iowa.

(Notary seal, Henry Jayne, notarial Iowa.)

(Indorsed Mary W. Achter to Morris B. Beardsley. Power of Attorney. Daniel G. Rollins for F. 1275 ————————, 32 Nassau street.)

450 xQ. That paper was received at the same time as the power sent by you was received, was it not?

Mr. Sherman: Question objected to as incompetent.

A. Yes, sir.

451 xQ. They both came in the one envelope?

A. As near as I can recollect.

452 xQ. And both sent at the same time to Judge Beardsley?

A. Yes, sir; I think so.

453 xQ. Addressed to him at Bridgeport, I presume?

A. Yes, sir; as near as I can recollect.

454 xQ. That is your recollection, and that F. 1276 they were not sent to Judge Rollins?

A. Yes, sir.

455 xQ. They were both executed by you and your sister, I presume, at the same time?

A. Yes, sir.

456 xQ. Before this Notary Public?

A. Yes, sir.

457 xQ. Did I understand you to say that your sister was not in New York while you were here?

A. No, sir, she was not.

458 xQ. Had she been in New York previous to your coming here?

A. Not in connection with this case.

459 xQ. In connection with that matter I refer?

A. No, sir.

460 xQ. Was she here after that?

A. No, sir.

461 xQ. Between the time that you executed those releases or that release on the 16th of March, and the time when you left New York to return to Muscatine, how many communications did you receive from Judge Beardsley?

A. I could not tell.

F. 1277 462 xQ. What is your best recollection?

A. Well, I really have no recollection.

463 xQ. You did hear from him?

A. Yes, sir.

464 xQ. Are those letters in your possession, or in the possession of your attorney and counsel?

A. I do not think they were all saved.

465 xQ. Were any saved?

A. I think there was a couple shown here since we have been in the court room this time.

466 xQ. Are they in the possession of your counsel, Mr. Sherman?

Mr. Sherman: Objected to as violative of the privi-
lege of the Code, and on that ground I advise
F. 1278 the witness not to answer.

Mr. Bovee: Do you decline to answer?

The Witness: Yes, sir.

Mr. Bovee: Counsel for the defendants states that he has not asked the questions which the witness has refused to answer to be certified to the Court, but holds them all in abeyance and reserve until the conclusion of the testimony of the witness, or until such other time as he may see fit to ask them to be certified.

Mr. Sherman: Counsel for the complainants does not wish to be understood as acquiescing in the sup-

position of counsel for the defendants as to the effect of his omission to request a certificate.

NEW YORK, February 8, 1901.

Met pursuant to adjournment. Present: The
F. 1279 Examiner, Mr. Sherman, Mr. Blaikie, Mr. Bovee, Mr. Stimson, a representative of Russell & Holmes and a representative of Nash & Jones.

Continuation of the examination of *EMMA S. FAYERWEATHER.*

By Mr. Bovee:

467 xQ. After your return to Muscatine in the winter of 1891, was your sister, Mrs. Achter, living in the same town? A. Yes, sir.

468 xQ. The same house? A. No, sir.

F. 1280 469 xQ. Nearby neighbors? A. Yes, sir.

470 xQ. How far apart?

A. A couple or three blocks, I think.

471 xQ. And her husband was with her?

A. Yes, sir.

472 xQ. Were you not in constant communication with her and with him at that time?

A. Yes, sir.

473 xQ. So far as you know whatever information they had respecting the matter was communicated to you, was it not? A. Yes, sir.

474 xQ. And whatever you learned was communicated to them? A. Yes, sir.

475 xQ. Do you know how many suits are now pending against the executors of Daniel B. Fayerweather, in which suits you are a plaintiff?

Mr. Sherman: Objected to as immaterial and irrelevant.

A. I do not think I could say positively.

476 xQ. Can you tell me how many complaints you have verified in which actions you were plaintiff and the executors of Danlel B. Fayerweather were defendants?

Mr. Sherman: Objected to as immaterial and
F. 1281 irrelevant.

A. I could not say positively.

477 xQ. Do you know how many such actions have been brought in your name?

Mr. Sherman: Same objections.

A. I could not say positively.

478 xQ. Do you know how many suits have been brought in your name against Thomas G. Ritch, Henry B. Vaughan, John E. Parsons and William H. Arnoux for alleged conspiracy?

Mr. Sherman: Objected to on the ground that the pendency and the nature of such suits is not to be proved by the opinion of the witness but by the record.

A. My knowledge of law is so limited that I
F. 1282 could not tell you.

479 xQ. Will you permit me to say, Mrs. Fayerweather, that that does not answer my question. If you do not know, say so?

A. Well, I do not, I cannot say that.

480 xQ. Do you know of the pendency at this time of any such suit in your name?

Mr. Sherman: Same objection.

A. I think there is.

481 xQ. Do you know when that suit was begun?

Mr. Sherman: Objected to as immaterial.

A. I could not say positively.

482 xQ. How do you know that such a suit has been begun, Mrs. Fayerweather?

Mr. Sherman: Objected to as assuming a fact not stated and on the ground that it appears from the testimony that the witness can have no personal knowledge as to when the suit described was begun, that resting upon the service of process which in the nature of things was done in her absence.

(At the request of the witness, Question No. 482 was repeated by stenographer.

F. 1283 A. I do not know how I should know. I do not know how to answer the question.

483 Q. Is it not a fact that whatever information you have received upon the subject has been conveyed to you by John B. Reynolds?

Mr. Sherman: Objected to on the ground that the question calls for communications between the witness and her attorney; and upon that ground I advise the witness to decline to answer the question, as well as on the ground that the inquiry is wholly irrelevant to any issue in this case and as not cross-examination but as a fishing excursion of the connsel for the defendants for ulterior purposes.

The Witness: Under advice of counsel I decline

F. 1284 to answer.

484 xQ. And is that upon the grounds stated in the objection for the counsel for the complainants?

Mr. Sherman: Objected to on the ground that the witness is not bound to formulate the grounds of objection, that being the function of her counsel, and that having been sufficiently done, for which reasons I advise the witness to decline to answer.

The Witness: Upon the advice of counsel I decline to answer.

485 xQ. Is John B. Reynolds the attorney you refer to?

Mr. Sherman: Objected to on the ground that the

opinion of the witness is not the best evidence as to whether John B. Reynolds is her attorney in the cause, as incompetent, irrelevant and immaterial, and inasmuch as the inquiry is merely an indirect way of seeking disclosure of communications between the witness and her attorney, I advise her on the same ground of privilege to decline to answer.

The Witness: Upon advice of counsel I decline to answer.

486 xQ. Upon what ground do you decline to
F. 1285 answer, Mrs. Fayerweather?

Mr. Sherman: I advise the witness not further to answer the inquiry.

The Witness: Under the advice of counsel I decline to answer.

487 xQ. Is John B. Reynolds an attorney and counsellor at law?

Mr. Sherman: I object to that as incompetent, irrelevant and immaterial, and on the ground that the present inquiry is merely a mode of evading the privilege of the witness, and upon that ground I advise her to decline to answer.

The Witness: Under advice of counsel I decline to answer.

F. 1286 488 xQ. Do you know when Mrs. Achter was last in the City of New York?

A. I could not say.

489 xQ. Was the suit in which you are now being examined brought by your authority, and if so under what arrangement, if any, between you and John B. Reynolds?

Mr. Sherman: I object to the question on the ground that inasmuch as the bill of complaint herein is verified by the witness it sufficiently appears that the suit was brought by her authority, and on the further ground that the inquiry is one violative of her privilege, in which connection I offer to show her only communication or ar-

rangement with John B. Reynolds related to the employment and retainer of counsel and their instructions by him as her agent, and therefore under the privilege of the Code upon which ground I advise the witness to decline to answer.

The Witness: Under the advice of counsel I decline to answer.

490 xQ. Is there any written agreement between you and John B. Reynolds with reference to the Fayerweather suits brought in your name? And if so, I ask you to produce it.

F. 1287 Mr. Sherman: Objected to on the ground that the arrangements made by this complainant for the conduct of her litigation is none of the business of the examining counsel, that the inquiry is impertinent, irrelevant and immaterial, and seeks to exploit matters protected from disclosure by the privilege of the Code, upon which ground I advise the witness to decline to answer.

The Witness: On advice of counsel I decline to answer.

491 xQ. Is it not a fact that whatever suits have been brought in your name against the executors of the Fayerweather estate and others in which you

F. 1288 were plaintiff were brought at the instigation of and suggestion to you by John B. Reynolds?

Mr. Sherman: Objected to on the ground that the inquiry is impertinent, that it is not cross-examination, that it it has no relation to any issue in this cause, that it is evidence at large in the cause, that the persons calling themselves executors have been shown at this stage of the record to be criminals, who have foisted upon the Court of Probate forged and fraudulent documents purporting to constitute them executors, and that any question which describes them as executors is misleading and untrue; and on these grounds and because the inquiry relates to the same privilege, for the same

reasons already stated, I advise the witness to decline to answer.

The Witness: On the advice of counsel I decline to answer.

492 xQ. You have referred to a letter from Judge Beardsley in March, 1891. When did you last see that letter?

A. The day that it was shown here on the table.

493 xQ. Did you not say upon your direct examination that you had not seen that letter for ten years?

F. 1289 Mr. Sherman: March, 1891, the question is? You ask about a letter of March, 1891, don't you? No such letter has been produced here.

Mr. Bovee: I withdraw the question.

Mr. Sherman: Do you mean the letter referring to the settlement?

494 xQ. You referred upon your direct examination to a letter from Jndge Beardsley in March, 1891. When did I understand you to say that you last saw that letter?

A. There was a a letter offered in evidence here, if I correctly remember it, was there not?

495 xQ. Madam, you have given the testimony here. If you will permit me to suggest I am only ask-

F. 1290 ing what you know about this.

A. I have not seen any letters that Judge Beardsley wrote to me at that time for ten years, unless they have been shown lately.

496 xQ. Do you recall receiving a letter from Judge Beardsley in March, 1891?

A. I could not recall when I might have seen it—when I received it, I should say.

497 xQ. You cannot recall?

A. No, sir, not the exact date.

498 xQ. You have referred to a letter which you thought had been destroyed. What letter did you re-

fer to then when you so testified?

A. Oh, that was one in reference to settling.

499 xQ. When did you receive that letter?

A. The only way I can judge this is in reference to the time of those papers you showed yesterday.

500 xQ. Why do you say that the letter was destroyed?

A. Because I think it was.

501 xQ. Destroyed by you?

A. Or my sister, Mrs. Achter.

F. 1291 502 xQ. Were there other letters received by you upon the same subject about the same time?

A. I do not recall.

Mr. Bovee: That is all for the present.

Mr. Bovee: I ask the Examiner to certify all of the questions which the witness has refused to answer to the Court in order that it may be determined whether she shall answer the questions which she has refused to answer or not.

The Examiner: In the meanwhile I will certify this record to the Court as to Miss Fayerweather.

F. 1292

Mr. Sherman: Counsel for the complainants reads in evidence from the record upon the Hamilton College plea the deposition of John C. Baylor.

JOHN C. BAYLOR (colored), called as a witness on behalf of the complainants, being duly sworn testified as follows:

Direct examination by Mr. Blaikie:

1 Q. What is your name?

TESTIMONY OF JOHN C. BAYLOR.

A. John C. Baylor.

2 Q. During Mr. Daniel B. Fayerweather's lifetime, did you know him? A. Yes, sir.

3 Q. Were you at any time in his employ?

A. Yes, sir.

4 Q. When and where?

A. 11 East 57th street.

6 Q. In what capacity were you employed?

A. I was butler and valet to him.

7 Q. For how long a time were you so employed?

F. 1293 A. About six years.

8 Q. Were you so employed at the time of his death, November 15th, 1890?

A. Yes, sir.

9 Q. Did you serve him with any food on that day?

A. No, sir.

10 Q. Why not? A. He was too weak to take food.

11 Q. Do you know Henry B. Vaughan?

A. Yes, sir.

12 Q. How long have you known him?

A. I got acquainted with him soon after I went to Mr. Fayerweather's.

13 Q. Did you see him at Mr. Fayerweather's house on the day Mr. Fayerweather died?

F. 1294 A. Yes, sir.

14 Q. Was he there little or much of that day?

A. He was there a great part of the day.

15 Q. A great part of the day? A. Yes, sir.

16 Q. Did you talk to him or did he talk to you?

A. No, sir.

17 Q. Did he ask you to do anything or say anything to you?

A. He gave me a message to take to Dr. Wilcox and Dr. Vedder.

18 Q. What time of day?

A. Between two and three o'clock.

19 Q. Was it in writing or verbal?

A. Verbal message.

20 Q. What did he tell you?

A. He told me to tell Dr. Vedder and Dr. Wilcox that their services would not be needed that afternoon.

21 Q. What did you do after he told you that?

A. I went up and delivered the message.

22 Q. To whom? A. To Dr. Vedder.

23 Q. At that time or about that time did you know Mr. Fayerweather's condition?

A. I knew that he was very weak?

F. 1295 Q. What was he doing, was he sitting up?

A. He was lying propped up in bed.

25 Q. In his bed? A. Yes, sir.

26 Q. Do you know whether there was any paper signed that day by Mr. Fayerweather?

A. I do not; I heard of a paper being signed afterwards.

27 Q. But you did not know anything about it?

A No, sir.

28 Q. In the Surrogate's testimony, Edward M. Grout has sworn, on page 501, these words, he says that at the time it is claimed Mr. Fayerweather signed a paper on his dying day in his bedroom, which paper he claims was a codicil to his will, he says this, "when I

F. 1296 reached the place in the codicil where the sentence occurs, 'in witness whereof I have hereunto set my hand and seal,' Mr. Fayerweather raised himself from his pillows, drew his feet out beside the bed, and was seated on the side of the bed just as I am seated in this chair, except that his feet did not touch the floor." Now could Mr. Fayerweather at that time raised himself from his pillows?

A. No, sir.

29 Q. Could he have drawn his feet out beside the bed?

A. No, sir.

30 Q. Could he have sat upon the side of the bed without help?

A. No, sir.

31 Q. Now, then, you know the bed he died in, do you?

A. Yes, sir; very well.

32 Q. How high was the part he lay on from the floor?

A. Well, I should say about a foot and a half to two feet, including the mattress and all.

33 Q. You say about a foot and a half to two foot?

A. Yes, sir; that is from the top of the bed, the mattress, to the floor.

34 Q. Well, if he had sat on it would his feet
F. 1297 have touched the floor or not?

A. His feet would have touched the floor.

35 Q. Could not have helped touching the floor?

A. Could not have helped touching the floor.

36 Q. You were in and out of that room that day?

A. Yes, sir.

37 Q. A good deal, were you?

A. Yes, sir.

38 Q. What was his position in the bed that day?

A. Lying half propped with two or three pillows under his shoulders and head.

39 Q. So that it brought his body up?

A. Yes, sir; kind of high, it was not level.

40 Q. Mr. Grout has testified on page 502, "he
F. 1298 raised himself at the point where his signature would come in in the codicil." From what you saw of him on that day could he have raised himself at all?

A. No, sir; he had not raised himself for several days prior to his death without assistance.

41 Q. During that day of his death were his eyes open or closed most of the time?

A. His eyes were closed during the time that I saw him, or most of the time that I saw him.

42 Q. How did he breathe?

A. He breathed very difficultly.

43 Q. Had difficulty on that day. Did you hear him speak while you were in his room?

A. No, sir; I did not.

44 Q. If he had spoken you would have heard him, would you not?

A. Yes, sir.

45 Q. What was your service or duty there with him?

A. I gave him baths and assisted him in dressing, and lifted him and rolled him from one room to another when it was necessary.

F. 1299 46 Q. Rolled in what?

A. In a wheel chair.

47 Q. And on that day did you roll him or was he in the chair at all?

A. No, sir.

48 Q. And would it have been possible for him, during the last two days of his life, to have done what I have read to you that Mr. Grout said he did on the afternoon of the day he died, without help?

A. No, sir, it was impossible.

49 Q. How was his eyesight the last few days of his life?

A. His eyesight was very poor.

50 Q. Could he see to read or write without

F. 1300 glasses?

A. No, sir; he generally wore two pair of glasses to read or to look at anything, and also had a large, what do you call it, a magni—

51 Q. Magnifying glass?

A. Yes, sir.

52 Q. You knew of it?

A. Yes, sir.

53 Q. And he had to have two pair of glasses and a magnifying glass to see to read, you say?

A. Yes, sir.

54 Q. And how was his hearing?

A. His hearing was very poor, and especially at dif-

ferent times, I do not know whether the weather affected him or not.

55 Q. Well, the last day or two of his life, how was his hearing then?

A. It was very poor.

56 Q. Did you have to speak louder than ordinary?

A. Yes, sir.

57 Q. Was his hearing poor a good while before his death?

A. Yes, sir.

F. 1301 58 Q. How long back should you say?

A. Well, I should say a year or more.

Mr. Blaikie: You may cross-examine.

Mr. Granger: We decline to cross-examine on the ground that we deem the evidence as irrelevant.

JOHN C. BAYLOR.

Sworn to before me this 4th day of March, 1899.

JOHN A. SHIELDS,

Examiner.

F. 1302

Mr. Bovee: Defendants object to the reading from the record upon the Hamilton College plea the testimony given by the witness Baylor as irregular, unauthorized, illegal and unprecedented; that the defendants, the executors of Daniel B. Fayerweather, were not present at that examination, did not participate in the examination, were not parties to the examination. They insist that the witness shall be produced and examined in the regular way in chief.

Defendants object to Question 9 as irrelevant and immaterial to the issues presented upon the special pleas.

Defendants object to Question 10 as irrelevant and immaterial to the issues presented upon the special pleas, and calling for the opinion and conclusion of the witness, and not for a fact, and incompetent.

Defendants object to Question 14 as irrelevant and immaterial to the issues presented upon the special pleas, incompetent and calling for the conclusion of the witness and not a fact.

F. 1303 The same objection to Question 15.

Defendants object to Question 20 as irrelevant and immaterial to the issues presented upon the special pleas.

The same objection to Question 21.

Defendants object to Question 23 as irrelevant and immaterial to the issues presented upon the special pleas, and calling for the opinion and the conclusion of the witness, and incompetent.

Defendants object to Question 26 as irrelevant and immaterial to the issues presented upon the special pleas and move to strike out the words "I heard of the paper being signed afterwards," as being irrele-

F. 1304 vant and immaterial and incompetent and not responsive to the question.

Defendants object to Question 28 as irrelevant and immaterial to the issues presented upon the special pleas, incompetent, calling for the opinion of the witness, and on the further ground that the witness was not present at the occurrence referred to in the question and is manifestly incapable of saying whether Mr. Fayerweather could or could not perform the act referred to in the question. We further object to the question as improper in form and leading, and assuming something which has not been proven.

Defendants object to Question 29 as irrelevant, immaterial and incompetent, calling for the opinion of the witness, and it further appears that the witness was not present at the time referred to in the question.

The same objection to Question 30.

Defendants object to Question 34 as incompetent, irrelevant, immaterial and hypothetical.

F. 1305 The same objection to Question 35.

Defendants object to Question 40 as irrelevant and immaterial to the issues presented upon the pleas, incompetent, calling for the opinion and conclusion of the witness and not for the fact, assuming facts which have not been proven, calling upon the witness to testify to what occurred at a time when the witness was not present. We move to strike out all after the words "No, sir," upon the same grounds and as not responsive to the question.

Defendants object to Question 41 as irrelevant and immaterial and incompetent.

F. 1306 Defendants object to Question 42 as irrelevant and immaterial and incompetent, and we move to strike out the answer of the witness upon the same grounds.

Defendants object to Question 43 as irrelevant and immaterial to the issues presented upon the special pleas.

Defendants object to Question 44 as irrelevant and immaterial to the issues presented upon the special pleas, and incompetent and hypothetical.

Defendants object to Question 48 as improper in form and leading, incompetent as calling for the opinion and conclusion of the witness, and hypothetical.

Defendants object to Question 49 as irrelevant and immaterial to the issues presented upon the special pleas, and we move to strike out the answer of the witness, and upon the further grounds that it is not responsive, and giving the opinion of the witness and his conclusion.

Defendants object to Question 50 as incompetent, irrelevant and immaterial and improper in form.

Defendants object to Question 53 as improper in form and leading, as irrelevant and immaterial to the issues presented upon the special pleas, and incompe-
F. 1307 tent.

Defendants object to Question 54 as irrelevant and immaterial to the issues presented upon the special pleas, and calling for the opinion of the witness, and incompetent.

Same objection to Question 55.

Same objection to Question 56.

Same objection to Question 57.

Same objection to Question 58.

Mr. Sherman: Counsel for complainants inquires of counsel for defendants whether they desire to cross-examine the witness John C. Baylor.

Mr. Bovee: Counsel for the defendants expects to cross-examine the witness, John C. Baylor;
F. 1308 and inquires of counsel for the complainants when he will produce the witness Baylor for cross-examination.

Mr. Sherman: Counsel for complainants states that he will produce the witness Baylor for cross-examination upon the termination of the depositions now unfinished, supposing that that will be on or about next Thursday morning.

Mr. Bovee: Counsel for the defendants protests against the reading of depositions without the production of the witnesses whose depositions are read at the conclusion of their examination in chief. Defendants insist that the witnesses shall be produced and examined

as their testimony is read from the record in the Hamilton College plea, so that the examination of each witness may follow the objections and the testimony in chief, in order.

Mr. Sherman: Counsel for the complainants states that he has been obliged to depart from the natural order of examination by the insistence by and on behalf of Mr. John E. Parsons, that whenever Mr. Parsons is able to attend, the depositions selected by him shall then proceed for his examination, there being at this
F. 1309 time held open under that insistence the deposition of John B. Reynolds, upon the contention that Mr. Parsons shall be permitted to continue the re-examination; also the deposition of Emma S. Fayerweather upon the insistence that Mr. Parsons shall be allowed to cross-examine her further than she has been cross-examined, and that therefore counsel for complainants is making the best arrangements that he can to defer to Mr. Parsons' insistence, and at the same time make some progress in the taking of depositions.

I now read in evidence from the record upon the Hamilton College plea the deposition of Prescott Hall Butler, and in that connection I read in evidence the opinion of Lacombe, J., at page 53 of the record,

F. 1310 (See Exhibit No. 56 of Appendix of Exhibits, page 286.)

and the order thereupon at page 123—

(See Exhibit No. 57 of Appendix of Exhibits, page 287.)

Mr. Bovee: I must insist on my rights in respect to this matter. That is not the record. I insist that any paper which you read from shall be a record, if there is

such a record, authenticated from the files of the Court; and the paper which is before you is not such a record.

Mr. Sherman: Mr. Bovee, this Court takes judicial notice of its own records. Also the order of Judge Lacombe———

Mr. Bovee: That des not answer the objection.

Mr. Sherman: I cannot rule on your objection. When you have got through with it I will go on. I have nothing to do with your objection, you cannot
F. 1311 address it to me.

Mr. Bovee: This is the record that I have been following, the stenographer's minutes.

Mr. Sherman: These are depositions taken by the Examiner.

At this point the Examiner was sent for.

Mr. Sherman: Mr. Examiner, in pursuance of an order of Judge Lacombe permitting us to introduce in evidence as against these defendants the testimony taken as against Hamilton College, I am reading in evidence the deposition of Prescott Hall Butler. So far there is no conflict. The conflict arises here;
F. 1312 in connection with that I am reading from the records of this Court an opinion of Judge Lacombe which is on file in this Court to the effect that Mr. Butler must answer certain questions about a codicil of Mr. Fayerweather. I am reading in evidence an order made by Judge Lacombe following that opinion requiring Mr. Butler to answer. I am reading in evidence an order adjudging Mr. Butler in contempt for not answering. I am about to read in evidence an order on a mandate of the Circuit Court of Appeals reversing the order adjudging Mr. Butler in concontempt. In other words, as it is a part of the history of this case, and as I do not want to put

Mr. Butler through the process of being in contempt and out of contempt again, as that is an idle proceeding, and as I want to inform the Appellate Court as to the course taken in regard to Mr. Butler, I am reading those in evidence. Now my opponent, having by frequent use acquired a great fondness for your original depositions wherein you attested that the various witnesses had sworn so and so, and finding none of these depositions filed with you, not the record filed with you but the depositions, objects to my going on and putting
F. 1313 these in. He insists that as he cannot find the record for final hearing, and as it is not in the depositions, where it would not under any circumstances be anyway, that therefore I am precluded from introducing this evidence. I presume he has something to say in support of that.

Mr. Bovee: It would not be essential for me to say anything, Mr. Examiner, if the counsel for the complainants had stated the facts. The fact is that the counsel for the complainants produces a book, not identified, not from the files of this Court, not the record of this Court, and proposes to read, indicating the pages in that book from which he proposes to read into this record.

My objection is not to his reading from the records,
F. 1314 properly authenticated records of the Court.

That book is a book which I have not, I do not know where it came from, it comes from him, it does not come from the files of the Court. And I submit that any paper which he reads testimony into this case shall be produced from the records and the files of this Court. The paper which has been used for the purpose of the introduction of the testimony of the Amherst College case is in my hand, produced from the files of the Court.

Mr. Sherman: That was not used on final hearing, it could not be.

Mr. Bovee: Where is this book.

Mr. Sherman: It is your business to find it.

Mr. Bovee: Not at all, it is the business of the other side to find that record and produce it when they introduce testimony from it.

The Examiner: If he wants to he can take the chances of introducing it in that way. Of course the original is the best evidence, on file, but he takes the chance.

Mr. Bovee: It is not the question of his taking the chance, it is my right to insist that he shall read
F. 1315 from an authenticated record and not from the paper which he has here.

The Examiner: I cannot pass upon the materiality or relevancy of any question.

Mr. Bovee: You can say whether he shall be permitted to read from the Koran into this case.

Mr. Sherman: The Koran is not a record of this Court.

The Examiner: You may put your objection down. I cannot pass upon the materiality or the relevancy of any question.

Mr. Bovee: But you can take this paper and say whether it is the record of the Court.

The Examiner: A book like that is on file.

F. 1316 Mr. Sherman: The opinion I offer in evidence, you have the original opinion, have you not?

The Examiner: Yes, the original opinion is on file.

Mr. Bovee: Now, as a matter of fact, Mr. Blaikie has sought to find that record, and he cannot find that any such thing is on file, and he has produced the original stenographer's minutes to read from. It is is not for me to keep your record straight.

Mr. Sherman: Find it yourself. He has done it as a mere convenience to you.

Mr. Bovee: Mr. Examiner, if that paper is the record of this Court, and if there is such a record it ought to be easy to produce it so that we can follow from

that record, if there is such a record; but I state to you that Mr. Blaikie has made a search for that record and he says he cannot find it and he has produced the stenographer's minutes.

The Examiner: What original record do you want?

Mr. Bovee: The original of the printed record that the counsel is now using.

Mr. Sherman: This printed record has been made the basis of a decree in this case. It must be on file. I am not the custodian of it. I know it is a
F. 1317 duplicate of this because they were all printed from one set of type.

The Examiner: We have that on file. I will have it hunted up.

Mr. Bovee: To permit the record to be made up from something off of the files of this Court would be manifestly improper and irregular.

Mr. Sherman: This counsel apparently does not know the fact and the practice that before this record which is now being taken can be the basis of any action by the Court it has to be certified by the Examiner. He does not appear to be aware that when I offer in evidence an order which is on file, an opinion which is on file—everybody knows
F. 1318 about these orders, about Mr. Prescott Hall Butler and the Circuit Court of Appeals' action, they are all orders on file—to say that I cannot for convenience read them into the record subject to your examination and certificate is preposterous. The discussion is idle, it does not mean anything. Here is the original deposition of Prescott Hall Butler. Counsel is entirely at liberty to use the original which he has. The question does not arise upon that at all; but the order and the opinion on the contempt proceedings could not be in that exhibit by accident or as a matter outside of any practice; they are in the record for final hearing.

The Examiner: The better way to do is to go on and offer it and let him object, and I will have the original looked up.

Mr. Sherman: I will strike out from my offer the reference to the page. I offer in evidence the opinion of Lacombe, J., on file in this Court, dated October 22nd, 1891, the order thereon dated October 24th, 1898, the order adjudging Mr. Butler in contempt which is found at pages 234 and 235 of the original deposition of said Butler, the order of this Court upon
F. 1319 the mandate of the Circuit Court of Appeals made in a proceediug instituted by Prescott Hall Butler, entitled Prescott Hall Butler, plaintiff in error, against Emma S. Fayerweather and another, entered January 19th, 1899.

(See Appendix of Exhibits, No. 55, page 285—No. 56, page 286—No. 57, page 287—No. 58, page 288—No. 59, page 294—No. 60, page 295.)

Mr. Bovee: Defendants object to the reading of the deposition of Mr. Butler as unauthorized, the deposition of the witness having been taken in a proceeding to which defendants were not parties. They ob-
F. 1320 ject to the various orders that have been offered in evidence, and mandates, as incompetent, irrelevant and immaterial.

Adjourned to February 13th, 1901, at 10:30 A. M.

The Examiner certifies the record to the Court.

NEW YORK, September 28, 1898.

Testimony taken on behalf of the complainants, under the 67th rule in equity upon the issue joined upon the

replication of the complainants to the plea and answer of the defendant Hamilton College.

APPEARANCES:

Roger M. Sherman, Esq., solicitor for complainants.

William Blaikie, Esq., solicitor for John B. Reynolds, as executor of the last will and testament of Lucy Fayerweather, deceased.

Messrs. Root, Howard, Winthrop & Stimson, solicitors for the defendants, Trustees of Hamilton Col-
F. 1321 lege.

Arthur C. Hume, Esq., and James L. Bishop, Esq., of Counsel.

PRESCOTT HALL BUTLER, called as a witness on behalf of the complainants, being duly sworn, testified as follows:

Direct examination by Mr. Sherman:

1 Q. Mr. Butler, you are a member of the bar of the State of New York?

A. Yes.

F. 1322 2 Q. And you have been for a number of years?

A. Twenty odd years, yes.

3 Q. And you are a member of the law firm of Evarts, Choate & Beaman? A. Yes.

4 Q. And you were a member of that firm in November, 1890? A. Yes.

5 Q. Do you know Henry B. Vaughan? A. Yes.

6. How long have you known him?

A. I do not remember; I should say fifteen years or more.

7 Q. He has been a client of your law firm for some time prior to November, 1890, since some time prior to November, 1890?

A. I have only known he was a client.

8 Q. Since a time prior to that?

A. Prior to 1890, yes; as long as I have known him. I have known him as a client, nothing else.

9 Q. Did such business as your firm did for him come into your hands practically at any time?

A. I cannot answer that; I have done business
F. 1323 for him as a lawyer.

10 Q. Prior to November, 1890?

A. Yes.

11 Q. On or about the 10th of November, 1890, did you have an interview with Mr. Vaughan in reference to a contemplated will or codicil, to be executed by Mr. Daniel B. Fayerweather?

Mr. Hume: I object to that as incompetent, irrelevant and immaterial. I object to it on the further ground as not calling for any evidence on the issues raised by the pleadings.

A. The date that you mention recalls nothing particular to my mind. As to the remainder of the question, I decline to answer it on the ground of pro-
F. 1324 fessional privilege.

12 Q. Whose professional privilege?

A. My own.

13 Q. You understand that the privilege is one to the client and not to the attorney?

A. I do not intend to discuss the matter with you Mr. Sherman.

Mr. Sherman: I will ask the Examiner to certify to the Court the contumacy of the witness, so that I may make the proper motion.

The Examiner states that he will certify the record to the Court.

14 Q. Did you on or about the 10th day of November,

1890, upon the request of Henry B. Vaughan and from writings furnished by him draft what purported to be a codicil or proposed codicil to the will of Daniel B. Fayerweather.

Mr. Bishop: That is objected to upon the ground that it is incompetent and immaterial, and calls for no testimony competent or material under the issues raised by the plea and replication.

A. The date which you mention recalls nothing particular to my mind. Apart from the date I can

F. 1325 answer no.

15 Q. Did you on or about the 10th day of November, 1890, prepare a draft or proposed codicil to the will of Mr. Daniel B. Fayerweather and deliver it to Mr. Vaughan?

Mr. Bishop: Objected to. It is not necessary that I should repeat the objection every time. I object to it upon the same grounds, as incompetent, irrelevant and immaterial.

Mr. Sherman: That right is reserved to Mr. Root to put in any objection at the next hearing with the same force and effect as if they had been put in now. If in addition to that you are going to conduct the matter, and object to every question, then I withdraw

F. 1326 my acquiescence to that mode.

Mr. Bishop: I think I will take my objections now.

Mr. Sherman: Then I will will withdraw my consent to the arrangement that Mr. Root interpose subsequent objections; Mr. Bishop taking the responsibility of putting in objections now, I will not consent that they be supplemented hereafter.

The Examiner: I will let it stand in view of the fact that Mr. Root has made an application for an adjournment. Mr. Root may want to add to the objections.

Mr. Sherman: In view of the fact that when I consented to reserve the right to Mr. Root to make ob-

jections, in the form at the head of the deposition, and that Mr. Bishop had not announced his appearance as counsel, but has since done so and is acting as counsel and interposing objections at this time, I with draw my consent and acquiescence in the direction made by the Examiner reserving to Mr. Root that right, and contend that without that consent the Examiner has no such power.

Question repeated.

F. 1327

Mr. Bishop: That question is objected to as incompetent, irrelevant and immaterial, and upon the ground that it calls for no evidence competent or material under the issues raised by the plea and replication.

A. The date mentioned brings no particular fact of the matter to my recollection. (Whatever connection I had with Mr. Fayerweather or with Mr. Vaughan at or about that time was as lawyer and client, was that relation existing between lawyer and client; I had none other whatever, and I decline, therefore, on the ground of professional privilege, to answer the question.

16 Q. At the time of the act inquired of, had you
F. 1328 ever seen or had any business relations with Daniel B. Fayerweather?

Mr. Bishop: Objected to as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. I have not stated that the thing called "the act inquired of" ever existed. At or about the time mentioned, I had a personal interview with Mr. Fayerweather as his lawyer.

17 Q. I am now inquiring of a time prior to the 11th day of November, 1890, and prior to the execution of any codicil drawn by you, and I ask you

whether, prior to the 11th day of November, 1890, you had ever done any business for Daniel B. Fayerweather, or had ever seen him?

Mr. Bishop: Objected to upon all the grounds stated in regard to the previous question. Now, if you choose to put on record a consent, that objection shall be taken in that form to every question—

Mr. Sherman: I have already given Mr. Root every opportunity to object.

Mr. Bishop: You have withdrawn it.

F. 1329 Mr. Sherman: Because you are objecting.

Mr. Bishop: Then I will put the objection down in the same form which I have put it to the previous question. I object to it as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. Mr. Fayerweather had, according to my best recollection, been a client of my law firm for some years prior to that time, and was then a client of the office. I personally saw Mr. Fayerweather at his house in Fifty-seventh street on the occasion of the execution of a paper. This was once only, and was, I believe, according to my present recollection, some

F. 1330 weeks before his death. Whenever it was, it was only once that I saw him and I saw him there at his house. I had never seen him personally before, and never saw afterwards.

18 Q. Do you wish to be understood as saying that Mr. Fayerweather's having been previously a client of your firm raised between you the relation of attorney and client in reference to the transaction about which I am inquiring, so as to seal your lips by the professional privilege, although at that time Mr. Fayerweather had not directly employed you in this matter?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it

calls for no evidence competent and material to the issues raised by the plea and replication.

A. I do not catch the meaning of the question. I do not mean to be understood otherwise than what I have stated.

19 Q. I am seeking to learn with formal regularity of a question, whether you consider this silence to be caused by a professional relation to Mr. Fayerweather then existing, or by a professional relation with Mr. Vaughan then existing.

F. 1331 Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. Both.

20 Q. So far as Mr. Fayerweather was concerned, was not your professional relation with him created by his adoption of the paper which you took to his house on or about the 11th day of November, 1890; I refer to the paper which was executed at his house?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea or replication.

F. 1332 A. I do not so understand it, if you will permit me, Mr. Sherman, I will state the facts as far as I understand my professional obligation permits me.

21 Q. Certainly.

A. I want you to understand now that except for that, I have no objection whatsoever to stating everything that occurred, but I have a very great objection to opening the door to disclosing matters that occurred in my private office. Mr. Vaughan came to my office to consult with me as a client upon matters practically relating to himself. I had such a consultation with Mr. Vaughan in my private office. At the same time, Mr. Vaughan, as representing Mr. Fayerweather—

22 Q. Claiming you mean, to represent him?

A. As representing him. I knew that Mr. Vaughan was Mr. Fayerweather's attorney—

23 Q. In fact?

A. Attorney in fact. I knew that because of the relation that existed between Mr. Vaughan and Mr. Fayerweather as attorney in fact and principal; it was very largely the result of matters concerning which he had acted as counsel for Mr. Fayerweather. At this interview which was had in my private office
F. 1333 with Mr. Vaughan, Mr. Vaughan as representing Mr. Fayerweather had a consultation—

Mr. Bishop: Mr. Examiner, I object to the witness going on and making this statement.

The Examiner: You cannot object now. You must wait until the witness gets through with his answer and then put your objection afterwards.

Mr. Bishop: I think we are entitled to have specific questions and answers, so that objections may be taken.

The Examiner: No, you cannot do that, you cannot interrupt in the middle of a witness's answer. Go on.

The Witness (Continuing): As a result of that interview, I had one or two communications with Mr.
F. 1334 Fayerweather before my personal interview withhim at his house which I have before referred to.

24 Q. When you say "him," you mean Vaughan; the grammatical construction of your sentences makes it read as if you had one or two interviews with Mr. Fayerweather; you mean Mr. Vaughan?

A. Mr. Fayerweather.

25 Q. I thought you said you had seen him but once?

A. Communications, I said, with Mr. Fayerweather before my personal interview with him. All these communications and this interview were strictly and solely professional, and were those of a client and counsel.

Mr. Bishop: I ask to have the answer stricken out upon the ground that it is immaterial and irrelevant to any issue raised by the pleadings.

26 Q. When you speak of communications with Mr. Fayerweather prior to the execution of this paper you mean nothing more than that Mr. Vaughan acted as intermediary in taking to Mr. Fayerweather advice given by you and bringing back some response thereto from Mr. Fayerweather; is not that correct?

Mr. Bishop: I object to the question as in-
F. 1335 competent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. The methods of my communication with Mr. Fayerweather I decline to answer on the ground of professional privilege.

27 Q. Do you know that you were communicating with Mr. Fayerweather except that Mr. Vaughan told you so?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

F. 1336 A. I decline to answer on the same ground.

28 Q. Do you not think that that refusal makes you too much the judge of the facts upon which the professional privilege rests?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication, and on the further ground that it calls for a conclusion or opinion of the witness and not for any facts.

A. My knowledge on the subject was acquired as part of my professional employment, and therefore I cannot state it.

29 Q. Can you state any fact, as distinguished from your opinion of the legal effect of acts, which in your own mind has a tendency to show that the profession-relation and result of the privilege existed between you and Mr. Fayerweather prior to the date of the execution of that paper at his house, except the statements which you have already made this morning?

Mr. Bishop: Objected to as incompetent, irrelevant and immaterial, and for the reason that it calls
F. 1339 for no evidence competent or material to the issues raised by the plea and replication.

A. That comes pretty close to the wind, but I will state it. Mr. Fayerweather's own statements to me on the occasion of my interview at his house.

30 Q. And is that all?

A. His own statements to me relative to these previous communications, showing that whatever they had been they had emanated directly from him.

31 Q. And is that the only fact responsive to the question which you can state?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to
F. 1338 the issues raised by the plea and replication.

A. That is enough, I think.

32 Q. If there are some more facts it is not enough?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea or replication.

A. That is your statement.

33 Q. The question is repeated. Is that the only fact responsive to the question which you can state.

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it

calls for no evidence competent or material to the issues raised by the plea and replication.

A. No, that is not all; the fact is, as I have before stated, that (Mr. Fayerweather was a client of my office at the time.)

34 Q. And is that all?

A. I do not know of anything else.

35 Q. Now, will you please state what communications Mr. Fayerweather made to you, which in your mind established, as you say, the fact that the previous
F. 1339 communications through Mr. Vaughan had been authorized by him?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. I cannot state any communications made to me by Mr. Fayerweather, on the ground of professional privilege.

36 Q. Do you consider the fact that Mr. Fayerweather had previously employed your firm, or the other members of it, or some of them, to attend to other matters for him, had any effect to create a professional privilege as to the paper executed at
F. 1240 his house and prior to his adoption of the acts of Mr. Vaughan or to cover any of those prior acts from disclosure?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication; and, furthermore, that the question calls for a conclusion, merely, and not for any fact, for a mental operation.

A. I consider that the relation of attorney and client existed between my office and all the members of it and Mr. Fayerweather at the time.

37 Q. So far as you know, had there been any prior

business relation with Mr. Fayerweather, except that your firm prepared the power of attorney which made Mr. Vaughan the attorney in fact for Mr. Fayerweather?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. I have not stated that my firm prepared the power of attorney.

38 Q. I say that you have previously stated that
F. 1341 he was the attorney in fact for Mr. Fayerweather, and you knew it. So far as you know, had there been any prior business relations with Mr. Fayerweather, except that your firm prepared the power of attorney which made Mr. Vaughan the attorney in fact of Mr. Fayerweather?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. I have not said that my firm prepared the power of attorney referred to. I have said that my firm were counsel for Mr. Fayerweather in matters resulting in the execution of that power of attor-
F. 1342 ney, which I remember was prepared, and according to my recollection, the matters concerning which we were counsel for Mr. Fayerweather were of very wide interest and ran over some years and were still to a certain degree pending at the time you mention.

39 Q. Excepting the power of attorney, the relation of your firm to Mr. Fayerweather was entirely in relation to the business of the firm of Fayerweather and Ladew, was it not, and not to Mr. Fayerweather personally?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it

calls for no evidence competent or material to the issues raised by the plea and replication.

A. My recollection is that the matters concerning which we had advised and were advised with Mr. Fayerweather related to his business and consequently to a large extent to his firm affairs; but my recollection is that we were counsel for Mr. Fayerweather personally and not employed by the firm.

40 Q. Are you confident that you are right in that statement?

F. 1343 A. I am not.

41 Q. Do you not recall that the capacity of attorney in fact which Mr. Vaughan bore to Mr. Fayerweather was limited to Mr. Vaughan's acting for Mr. Fayerweather in relation to the affairs of the firm of Fayerweather & Ladew?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. I think that is so. This was a business firm and my recollection is we represented Mr. Fayerweather in certain directions in the firm of Fayerweather & Ladew; we did not represent the firm;

F. 1344 it was Mr. Fayerweather's personal interest in the matter which we were representing: that is my recollection.

42 Q. And you had no reason which you can state to believe, when Mr. Vaughan came to you on or about the 10th of November, that he was authorized by Mr. Fayerweather to enter into any matters concerning Mr. Fayerweather's testamentary papers except an inference that that might be likely because you knew that he had a power of attorney or was attorney in fact limited to the affairs of Fayerweather & Ladew and the interests of Mr. Fayerweather in that firm; is that correct?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. No, I have not stated, Mr. Sherman, that there was anything in the interview with relation to testamentary papers; I have not stated that, I have tried not to state anything whatsoever about the meeting.

43 Q. I put this in the negative way. If you hear it read more carefully, I think you will say it is not open to your criticism. Won't you hear it again?

F. 1345

(Question repeated.)

A. I have not stated that Mr. Vaughan interviewed me in any respect with relation to Mr. Fayerweather's testamentary papers.

44 Q. I have not said so; I have not implied so.

A. Yes, you have.

45 Q. I think not; but, of course, you must judge for yourself. I say, you had no reason to think he was authorized to enter into any such matter, I do not say that you or he entered into it. I understand very well that I am not going to get you to break the privilege until the Court holds that there is no privilege; at the same time, I am going to try and get the facts so far as they do not come within the privilege?

F. 1346

A. I have answered the question. I have not stated that there was any interview about testamentary papers and I cannot answer the question.

46 Q. Was there any fact known to you prior to the question of that paper which did not rest upon the word of Mr. Vaughan which established at that time the authority of Mr. Vaughan to act for Mr. Fayer-

weather in relation to your professional advice, which in your mind supports the claim that at that time you were justified in regarding Mr. Vaughan as the mouthpiece of Mr. Fayerweather, and thereby attaching to the communication of Mr. Vaughan the privilege of Mr. Fayerweather?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised in the plea and replication.

F. 1347 A. Yes.

47 Q. But none other than those you have stated?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised in the plea and replication.

A. Yes, I have not stated, heretofore, all of the proofs and indications to my mind existing at the time of my first interview with Mr. Vaughan showing the authority of Mr. Vaughan at that time to speak for Mr. Fayerweather. It was beyond what I have already stated——

48 Q. I asked you were they those which you
F. 1348 had previously stated, and you said no. Now, let me ask you to please state those other facts?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, for the reason that it calls for no evidence competent or material to the issues raised in the plea and replication.

A. My recollection is he assigned a paper.

49 Q. Who do you mean signed a paper?

A. Assigned a paper.

50 Q. By Mr. Fayerweather?

A. By Mr. Fayerweather; that is my recollection.

51 Q. Anything else? A. Nothing else.

52 Q. Then you regarded Mr. Vaughan as the mouthpiece of Mr. Fayerweather in all matters which led up to the execution of the paper spoken of by you?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. I have not so stated, and I do not now so state.

F. 1349 63 Q. Did you regard Mr. Vaughan as the agent or representative of Mr. Fayerweather in all matters communicated by him to you, if any, which led up to the execution of the paper at Mr. Fayerweather's house?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication; and upon the further ground that it calls merely for a conclusion and not for any fact.

A. The only interviews I had with Mr. Vaughan prior to the time of the execution of the paper at Mr. Fayerweather's house that I have above re-

F. 1350 ferred to. I should say immediately prior to the time. I do not know the exact time, a week or so, were professional interviews with him where I stood in relation of counsel to himself, or where he communicated something to me directly from Mr. Fayerweather himself as Mr. Fayerweather's mouthpiece. I had no other interviews with Mr. Vaughan at that time.

54 xQ. Well, is your objection based upon the claim that there existed a professional relation both between Mr. Fayerweather and Mr. Vaughan and yourself which prevents your disclosing the matters inquired of, and that that privilege extends not only to matters the result of the professional relation, but also extends

to prevent your stating the facts from which the privilege flows—in other words, do you claim to be the judge not only of the application of the privilege but of the facts upon which its existence must rest?

A. No, I won't pass upon that as a question of law, I may have that right.

55 Q. Is that your position upon this record?

A. No, that is not my position. (I am perfectly willing to state any of the facts which go to show this relation. I have tried to state them all; I
F. 1351 think you can count them on two fingers) of one hand, but I have stated them, I think, pretty fully in this examination.

56 Q. Perhaps my failure to get them is due to not asking the proper questions. I wish to learn how far you consider that the relation of laymen to the other members of your firm extends to close your lips upon matters known to you.

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication; and, also, as to form, it is improper in form.

A. Absolutely.

F. 1352 57 Q. Is it not true that Mr. Vaughan and not Mr. Fayerweather paid for the drawing of the power of attorney which constituted Mr. Vaughan the attorney in fact of Mr. Fayerweather?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. I cannot tell you that.

58 Q. Do you mean you won't, or you do not know?

A. I do not know anything about it; If I did I should not answer.

59 Q. Now, Mr. Butler, your firm has been paid by the executors, or those who claim to be the executors of Mr. Fayerweather's will, a fee of about $5,000 to resist the disclosure of the contents of the paper which was executed at Mr. Fayerweather's house on or about the 11th of November, 1890; is that not so?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the
F. 1353 issues raised by the plea and replication, and upon the further ground that it assumes facts which are not in evidence.

A. No.

60 Q. Are you aware that that sum was paid your firm and allowed in the accounts of the executors or alleged executors, and that the explanation of it given by Mr. Ritch was that it was in part, at least, payment for Mr. Choate's services in resisting or preparing to resist the disclosure of the contents of that paper.

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

F 1354 A. No.

61 Q. Do you mean to say that if any such thing was done, you were not aware of it, or do you deny the fact that it was done? Was your firm paid $5,000 by the alleged executors of Daniel B. Fayerweather?

Mr. Bishop: That is objected to as incompetent, irrelevant and immaterial, for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. I cannot state without examining our books.

Mr. Sherman: Counsel for the complainants in this connection disclaims any inference or contention or belief that the circumstances referred to in the ques-

tion could or would have any influence whatever upon Mr. Butler's testimony, and protests that the inquiry is not made with any such intimation or view.

62 Q. Are you willing to state Mr. Butler, whether there remains in your possession or under your control, any copy, draft, memorandum, notes, minutes or other writings which contain the substance or the exact contents in whole or in part, of the paper which was executed at Mr. Fayerweather's house on
F. 1355 the 11th day of November, 1890?

A. There is not.

63 Q. There is no such paper?

A. Not so far as I know.

64 Q. You testified before the Surrogate of New York County that the paper thus executed was a copy of a draft prepared by you. Would you like to see that testimony?

A. No, I remember that.

65 Q. What became of the draft prepared by you?

Mr. Bishop: I object to the question as incompetent, rrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. I think, Mr. Sherman, that I went a little
F. 1356 further in my testimony before the Surrogate than my professional privilege permitted me, but as I have already stated there, the paper was prepared by me, the draft was prepared by me, so I also will state, as I there stated, that in accordance with my best recollection I made most diligent search for such a draft, or anything in the nature of a draft, or memorandum or a copy, and could not find it. Of course I have not looked at this time, but I can say that from that time to this I have never seen anything in the nature of a copy or draft. I will also state for the benefit of you and the Court, that wherever the

draft went to, so far as my office or I personally am concerned, it was never intentionally destroyed, simply I did not suppose it was of any importance — or whether it was of importance or no, when I was asked to look for any such paper I was not able to find it, that is all.

66 Q. Was the copy made in your office, the copy of the draft which was executed?

A. Yes.

67 Q. Made in your office?

F. 1357 A. Yes.

68 Q. Was it made upon the typewriting machine? A. No.

69 It was engrossed by the engrossers in your office, or one of them?

A. Yes.

70 Q. What was the name of the man who engrossed it?

A. James Immerman — he don't know anything about it?

71 Q. Is he still in your office?

A. Yes.

72 Q. When and where did you last see the draft which you tried to find in your office?

F. 1358 A. I do not remember.

73 Q. Well, was it in your office since you tried to find it there?

A. What?

74 Q. Is it your best recollection that it was last seen by you in your office, since you tried to find it there, as you stated?

A. No, I stated before the Surrogate, and that was a good many years ago, and my recollection in these matters was better than it is now, and my recollection was that I left the draft with the original.

75 Q. Left it with the original?

A. Yes.

76 Q. At Mr. Fayerweather's house?

A. Yes. I so stated, I have absolutely no recollection on the subject to-day.

77 xQ. This writing signed by Mr. Fayerweather, which conveyed to your mind the authority to Mr. Vaughan, what has become of that?

A. Well, it is, I believe, in the printed papers here, some of those writings.

78 Q. Where is the original, so far as you know?

A. The printed papers in the Surrogate's pro-
F. 1359 ceeding.

79 Q. The printed papers cannot be the original?

A. I say that is what I refer to, I do not know; I am not the attorney in those proceedings; you can find out from any of the attorneys.

80 Q. I would have taken that course, but they will not admit the authenticity of any of the papers, so we have to get it by technical means. Where did you last see the original of that writing?

A. At that time in my office is my recollection; I never saw it afterwards.

81 Q. Was it a somewhat extended paper, or a short one?

F. 1360 A. Well, I think I must decline to answer that on the ground of professional privilege to whether it was long or short, or what. I have already stated that my recollection was it was signed by Mr. Fayerweather. You will want to know its contents next.

82 Q. I want to know what I may know about it. Are you willing to state whether it was on a single sheet or——

A. I do not think I am at liberty to say anything more about it further than this, that the existence of that paper, whatever it is, is referred to in the records of the Surrogate's proceedings.

83 Q. (Handing book.) Will you look at the book

which I now hand you, and state whether that is the record of the Surrogate's proceedings?

A. I could not tell you. I only appeared as a witness there, and I do not know; I cannot tell you.

84 Q. When you tell us that it appeared in that record, we assume that you know what that record is?

A. No, I do not know.

85 Q. Well, you cannot say?

A. No, I would have to know the whole record for that purpose.

F. 1361 86 Q. Was there more than one paper which you had from Mr. Fayerweather before the execution of that paper on November 11th, 1890?

A. I cannot say positively, but I think so.

87 Q. And was the paper which you do remember, signed by Mr. Fayerweather, brought to you with the first interview of Mr. Vaughan?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. That is my recollection.

87 Q. Well, do you know where the paper is, the original of it?

F. 1362 Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. I suppose it is in the Surrogate's Court.

89 Q. You have parted with all control over it?

A. I never had any control over it.

90 Q. Was it not left with you? A. No.

91 Q. Simply exhibited to you and taken away by Mr. Vaughan?

A. Well, I do not say that.

92 Q. Well, do you say that?

A. Yes, I will say that.

93 Q. How did you know that it was authentic? Did you know that it was Mr. Fayerweather's handwriting and not in Mr. Vaughan's?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent and material to the issues raised by the plea and replication.

A. No.

94 Q. You mean you did not know?

A. No, I did not know.

F. 1363 95 Q. And you do not know that this supposed authority from Mr. Fayerweather upon which you base your confidence that Mr. Vaughan was representing him, was not in Mr. Vaughan's handwriting instead of Mr. Fayerweather's, and signed by Mr. Vaughan and not by Mr. Fayerweather?

A. Oh, yes, I know it was authentic.

96 Q. It was all in Mr. Fayerweather's handwriting?

A. Oh, no, I wont say that.

97 Q. Well, what part of it was in his handwriting?

A. I said a paper signed by him; I did not say any of it was in his handwriting except his signature.

98 Q. Well, do you mean now that the body of it was in Mr. Vaughan's handwriting, and the signa-

F. 1364 ture in Mr. Fayerweather's?

A No.

99 Q. You do not mean that? A. No.

100 Q. Do you mean that you knew that the signature was Mr. Fayerweather's?

A. That I did know it?

101 Q. Yes?

A. No, I told you that I did not know at that time, if you mean by absolute knowledge, I did not know anything about it. When a man comes to me and shows me a paper, and I have known him a great many years, I assume that he is not committing a forgery, ordinarily; but when you ask me what I did

know about it at that time, I did not know anything about it, excepting that here was something which gave me an impression of authority upon the part of the person speaking to me; but you ask me now whether this paper which I assumed gave authority, was in fact signed by Mr. Fayerweather, and I say now, "I know it." You ask me how I know it, and I tell you that I know that the whole thing is on the record, but I did not put it on the record. If you will read the record, you will find it so.

F. 1365 102 Q. Then the paper you are speaking about, and which constitutes the only written authority upon which you acted in recognizing Mr. Vaughan as Mr. Fayerweather's messenger——

A. Didn't I say papers, paper or papers?

103 Q. You said that was the only one you could remember, of course that does not prevent your memory being refreshed. I only said so because you said so.

A. My recollection is that there were more than one paper; it may have been that there was only one.

104 Q. But the only paper which you can now recollect, which you considered as making a claim to represent him authentic, was the paper which has been, as

F. 1366 you say, fully disclosed and put on the record in the Surrogate's Court?

A. Yes.

105 Q. Well, is there any reason arising out of the privilege at this time, which will prevent your now disclosing at this time what that was, according to the best of your recollection?

A. Yes. It would not do any human being any harm, as I can see, but if a client comes to you and exhibits to you certain papers, the question is, have you a right to say what they are?

106 Q. No, but if you disclose it once——

A. I never have disclosed it.

107 Q. How did it become part of the record of the Surrogate's Court, as you understand it?

A. I had nothing to do with it.

108 Q. Did you not authenticate it before it was put in evidence? A. No.

109 Q. Was it not authenticated by Mr. Vaughan's testimony?

A. It is not anything that I have stated that I had anything to do with.

110 Q. Will you look at what purports to be
F. 1367 the printed record in the Surrogate's Court, and which you say contains this paper, and point out the paper to which you refer?

A. I should be very glad to, but I shall have to decline that on the ground of professional privilege.

111 Q. Then the privilege in that particular instance puts us to the trouble of finding in this printed record, to which you refer us, what the paper is; is that so?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. There is nothing in the paper itself which will indicate to you what it was, so how are you
F. 1368 going to tell?

112 Q. So that when you refer us to the Surrogates's record for the paper, you do not mean to convey to us any information as to what it was, is that your position?

A. I try not to.

113 Q. You referred us to the Surrogate's record in an effort not to disclose anything to us, did you not?

A. Well, assuming that I had a right to go as far as that, and say there was no secret about the paper, it was in the Surrogate's Court if you want to look for it. I say the existence of that paper at that time satisfied me of the truth of the representations of

Mr. Vaughan at that interview, that he represented Mr. Fayerweather.

114 Q. In answering a question awhile ago, which, in effect, stated that there was no necessity for inquiry about the original because the paper was contained in the Surrogate's record———

A. No, no, no, no.

115 Q. You did not intend to give any information, did you, in reference to that paper?

Mr. Bishop: I object to the question as incom-
F. 1369 petent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. Your question was directed to getting this paper, if you could find it. Was not that your question? Then you asked me subsequently if it was left with me, and I said I had nothing to do with it; that the paper was in the Surrogate's Court or that the paper was in the record; that I had nothing to do with it; is not that it?

116 Q. If you are satisfied with that answer, I must be?

A. That is not any answer, I was merely
F. 1380 asking a question. I did intend to give you all the information possible in relation to the paper; and if I thought it was within my right as counsel, to describe that paper in particular to you I would do so with the greatest of pleasure.

117 Q. You do not advance any objection to the disclosure of the contents of any of these papers except the professional privilege, do you; you have no interest whatever arising from the payment, if there had been a payment by the executors of $5,000 to your firm, or from any other reason or motive, or interest in disclosing or experiencing any failure of memory in reference to these matters?

A. None whatsoever.

118 Q. The whole matter with you is that you consider that you are bound to stand on the professional privilege, is that so?

A. That is all.

119 Q. Were the interviews with Mr. Vaughan attended with enough indicia of the importance of the business, to impress itself on your memory?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the
F. 1371 reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. I cannot answer that.

120 Q. Do you mean that you don't remember, or that you wont answer?

A. I cannot answer it.

121 Q. Why can't you answer it?

A. Because I either remember a thing or I do not; and I do remember a large part of this transaction very distinctly, and other parts very indistinctly; for instance, you say that this transaction took place in the year 1890; now, I was very strongly of the impression that at the time of this transaction I
F. 1372 was living in a certain house in New York which I moved away from in 1887, and you see I confused one house with another; and it must be, of course, that it took place in 1890, but I thought I was living, at the time, in a certain house in New York.

122 Q. That is a more or less arbitrary thing, the precise year, but the details, do you remember them?

A. Yes, I do.

123 Q. You think your memory has not suffered any relapse in regard to those matters?

A. Oh, it has, of course.

124 Q. Well, I mean as to the main features of what you did, and the reason why you did them?

A. No, the main features have not suffered any.

125 Q. You knew, did you not, that the purpose of the execution of this paper was to remove and exclude Mr. Thomas G. Ritch from all authority over this estate, either as executor or residuary legatee, and that that was the principal purpose and occasion for the execution of that paper?

Mr. Bishop: I object to the question as incom-
F. 1373 petent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. I must decline to state on the ground of professional privilege, anything of what I knew or did not know about this paper.

125 Q. Is it not true, Mr. Butler, that as representing Mr. Fayerweather, or as claiming to represent Mr. Fayerweather, Mr. Vaughan came to you, on or about the 10th of November, 1890, and stated to you in sub. stance that Mr. Fayerweather was in the condition when he might soon die; that he would leave a very large estate; that Mr. Thomas G. Ritch had
F. 1374 been his attorney, and had drawn his will and several codicils thereto; and he informed you at that time of the exact or substantial contents of the will and codicils which had been theretofore executed, and stated that Mr. Fayerweather had been persuaded that in an effort to carry out his desires respecting his entire estate, and to avoid the embarrassment or questions under the Statute of 1860, he had been persuaded by Mr. Ritch to make these testamentrry papers whereby Mr. Ritch and Mr. Bulkley were made his residuary legatees in form as absolute beneficiaries, but upon the undertaking by Mr. Ritch to apply the property which in that way he would ac-

quire the legal control of the title to, to the purposes embodied in the will as originally drawn, and the tenth clause thereof; and that he was further persuaded that Mr. Ritch had brought about that situation with the intention of personally profiting by it, and setting up the claim when the time came, that he was residuary legatee with Mr. Bulkley, without any secret trust or restriction whatever for his own benefit; and that under that conviction on Mr. Fayerweather's part, he has decided to change his testamentary papers, and that he
F. 1375 desired your firm, or you, to advise what change ought to be made, and what change could be made so as to prevent any such misapplication of his residuary estate, and so as to effectuate, so far as possible, Mr. Fayerweather's desires, though contradictory to the statute; and did you not advise either Mr. Vaughan, as representing Mr. Fayerweather, or subsequently Mr. Fayerweather, that the statutes could not be evaded in that way, and that you would not advise any testamentary paper to be executed for any such purpose; and that the only way and the best way to do was for Mr. Fayerweather to make a clear and candid expression of his wishes in the paper, in the testamentary paper; and to make such dispositions to those who were entitled to contest an
F. 1376 excessive legacy to colleges, and such institutions, as would satisy them; and that that was as near as he could lawfully go, or you would professionally advise him to attempt to go in carrying out his desires in so far as they were in conflict with the statute—didn't that occur, or that in substance?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent and material to the issues of the plea and replication.

A. On the ground of the profesional privilege I must decline to answer what Mr. Vaughan did or did not

say to me, and what I advised him or did not advise him on that occasion.

127 Q. Well, shall I repeat the question, or will you make a full answer to it?

A. For Heaven's sake don't; I decline to answer it.

128 Q. You decline to answer it upon the ground of professional privilege, I suppose, but this is not what you say?

A. I decline to answer what Mr. Vaughan said to me or did not say to me, and what I advised
F. 1377 him, or what I did not advise him, and that is the whole of your question.

129 Q. Will you make any other answer to my last question, except the answer which you have just made?

A. Yes.

130 Q. Will you proceed?

A. On the ground of professional privilege I decline to answer the question at all.

131 Q. Did Mr. Vaughan communicate to you at the time that Mr. Fayerweather had lost all his confidence in Mr. Thomas G. Ritch, that he had determined never to see him again?

A. I decline to answer on the ground of professional privilege.

F. 1378 132 Q. I prefer to finish my question before you answer?

A. Strike out the answer, then.

133 Q. And to place it beyond his power to control, or to exercise any discretion over Mr. Fayerweather's estate, or any part of it: and that it was essential and desired by Mr. Fayerweather, that Mr. Thomas G. Ritch should be dropped from the executors; and that the title to the estate under his testamentary papers should be vested in some person or persons excluding Mr. Thomas G. Ritch.

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls

for no evidence competent and material to the issues raised by the plea and replication.

A. On the ground of professional privilege, I decline to answer.

134 Q. Now will you state as fully and in detail as you can now remember, the entire contents of that paper which you say was executed by Mr. Fayerweather at his house, on or about the 11th of November, 1890?

Mr. Bishop: I object to this question as incompetent, irrelevant and immaterial, and calls
F. 1379 for no evidence competent or material to the issues raised by the plea and replication.

A. The paper that was so executed was prepared by me in my capacity as attorney for Mr. Fayerweather, and I decline, on the ground of professional privilege, to disclose its contents, or any part thereof.

135 Q. Mr. Butler, aside from the question of professional privilege, do you think you can state the substance, or the contents in whole or in part of that paper from your memory?

Mr. Bishop: I obect to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

F. 1380 A. As to whether I could or not?

136 Q. As to whether you can, aside from the question of professional privilege? A. Yes.

137 Q. Is it not true, Mr. Butler, that that paper executed on or about the 11th of November, 1890, omitted and excluded as an executor of the last will of Daniel B. Fayerweather, Mr. Thomas G. Ritch?

A. On the ground of professional privilege, I decline to state anything as to the contents of that paper.

138 Q. Who were the persons named as executors of the last will and testament of Daniel B. Fayerweather in the paper executed, as you have stated by him, on or about the 11th of November, 1890, at his house?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. Upon the ground of professional privilege, I decline to answer anything as to the contents of that paper.

139 Q. At the time of the execution of that paper by Mr. Fayerweather, did he appear to you to be of sound and disposing mind, and capable of making a

F. 1381 will?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. Am I permitted to answer that, Mr. Sherman?

140 Q. You called in a lot of witnesses to certify to that; do you think that was under the privilege of counsel?

A. I was not a witness.

141 Q. But you called them in to testify?

A. Am I not stating something as to my transactions with my clients in saying whether or no he was of sound mind at that time? What right have

F. 1382 you to ask me, as a lawyer, anything at all about my transactions with my client? If a lawyer is called to testify as to every transaction with his client, he will have no time to do anything else except to sit in a witness chair.

142 Q. Suppose some ill-disposed person destroyed a will; does your professional privilege extend to prohibit you from testifying anything concerning that will?

A. Well, I decline to answer the last question on the ground of professional privilege; I am not compelled to testify as to whether Mr. Fayerweather was of sound mind or not.

143 Q. You procured the attesting witnesses to go

through the statutory form, and to sign their names to that paper, did you not?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues of the plea and replication.

A. Yes.

144 Q. You said in the presence of Dr. Vedder and Dr. Wilcox and Miss Joyce, did you not, that it was desired by Mr. Fayerweather that they should hear
F. 1383 that he signed, sealed, published and declared that paper as and for a codicil to his last will and testament, in their presence, and that at his request and in his presence, and in the presence of each other, they were requested to subscribe their names as witnesses?

A. Yes.

145 Q. And Mr. Fayerweather heard you say that and assented to the request as being made for him?

A. I decline to answer that on the ground of professional privilege.

146 Q. Do you understand that the professional privilege extends to communications openly made to other persons for the purpose of having those other persons witness the matter?

F. 1384 Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent and material to the issues raised by the plea and replication.

A. No.

147 Q. Well, why do you decline to answer the last preceding question?

A. The last preceding question had relation solely to Mr. Fayerweather, whether he heard or not.

148 Q. Did your firm represent any of the parties to the litigation in the State Court ensuing from the tes-

tamentary papers of Mr. Fayerweather? You represented Harvard, did you not?

A. Yes.

149 Q. Any others?

A. Subsequently to Mr. Fayerweather's death we represented Harvard College.

150 Q. And Vassar? A. And Vassar, yes.

151 Q. Was the fact known to you at that time that the legal title, in the sense that executors have a legal title to the estate on controversy, was not
F. 1385 in the defendants sued as executors, but was in other executors?

A. Are you referring now to the proceedings subsequent to Mr. Fayerweather's death?

152 Q. Yes?

A. I had nothing to do with them.

153 Q. Did Mr. Choate have to do with that part of the case or that business?

A. I do not think so.

154 Q. Did Mr. Beaman?

A. Yes, I think Mr. Beaman did.

155 Q. Did you make known to Mr. Beaman
F. 1386 the contents of this fourth codicil, or a part of it?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent and material to the issues raised by the plea and replication.

156 Q. Or this paper executed November 11th, 1890, or any part of it?

A. I have no recollection of doing so.

157 Q. Do you know whether Mr. Beaman knew in what he did in and after that litigation for Harvard and

Vassar Colleges that the legal title, so far as the legal title is in executors in such matters, was not by the paper executed November 11th, in Thomas G. Ritch, Justus L. Bulkley and Henry B. Vaughan as executors, but was in others, including one or more of them, but not all?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. I do not know what he knew on the subject.

F. 1387 158 Q. He did not know that from you?

A. He did not.

159 Q. Do you remember at the time of the execution of that paper, Mr. Butler, that Dr. Vedder was present, this gentleman now present here (indicating).

A. No.

160 Q. And was one of the attesting witnesses?

A. No, I do not remember that gentleman. I cannot say that I remember the witnesses personally.

161 Q. Do you remember that Dr. Vedder was one of the attesting witnesses? Suppose you refresh your memory by looking at the codicil?

A. The testimony in the Surrogate's Court, which I happened to look at the other day, states that

F. 1388 Miss Joyce, I think, and the two doctors were the witnesses; that is my recollection now; I do not remember the names of the doctors.

162 Q. Do you remember that after you had read the codicil—or with deference to your position I will still call it the paper—to Mr. Fayerweather, and the whole of it, and the legal verbiage of it, he said anything to Dr. Vedder or either of the witnesses about what he gathered as the purport of it, or from the thing as a whole?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent and material to the issues raised by the plea and replication.

A. In my presence?

163 Q. Yes, in your presence, too?

A. No, he made no such statement.

164 Q. Let me see if I cannot refresh your memory. Didn't he say, turning to Dr. Vedder, this gentleman, "As I understand it, after everybody and everything is satisfied, the remainder is to be divided up among the different institutions, each to receive their share, or that in substance?

Mr. Bishop: What page are you reading from?

F. 1389 Mr. Sherman: 698.

A. Whose testimony is that?

165 Q. That is Dr. Vedder's testimony.

A. I have no recollection of any such statement.

166 Q. Are you prepared to say that that did not occur?

A. My recollection is that it did not.

167 Q. Are you positive in your recollection that it did not? I show you the record.

A. I never heard of any such statement as that before: my recollection is that he did not make it.

168 Q. Are you positive in your recollection that he did not?

A. I cannot see how he could have made any such statement as that, and I do not recollect it,

F. 1390 but it is a good many years ago. So far as my best recollection is concerned I would contradict that statement. I do not see that it is of very much importance.

169 Q. Do you say that because you recollect that the provisions in the paper then executed precluded any such understanding on Mr. Fayerweather's part?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. I decline to state what the provisions of that

paper were, directly or indirectly, on the ground of professional privilege.

170 Q. Didn't that paper, in substance, provide among other things, that the tenth clause in the will was restored so that it contained a mandate in the codicil that the devise to the colleges contained in the tenth clause of the will, should be reinstated and restored, and stand on its merits against any attack that should be made upon it?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason
F. 1381 that it calls for no evidence competent and material to the issues raised by the plea and replication.

A. On the ground of professional privilege, I must decline to answer the question.

171 Q. If you were credibly informed that that paper had subsequently been illegally destroyed, without the knowledge or authority of Mr. Fayerweather; and that it became necessary to reinstate it as his last will in order to defeat a crime; would you then feel precluded by the consideration of professional privilege from disclosing its contents?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason
F. 1382 that it calls for no evidence competent or material to the issues raised by the plea and replication; and, upon the further ground, that it is purely hypothetical and conjectural.

Mr. Sherman: Yes, but I do not intend to move the Court without making it appear necessary. I do not want to move against Mr. Butler unless it is absolutely necessary to protect my clients. I think I am authorized to make this inquiry.

A. So far as I know, yes.

172 Q. What do you understand to be the object of the professional privilege, to protect the interests of the client?

A. I must decline to answer the question, Mr. Sherman; I cannot go into that.

Mr. Bishop: This is not a law school.

The Witness: I must decline to answer the question as a hypothetical question and an argumentative question.

Mr. Sherman: I ask the Examiner to certify to the refusal of the witness to answer.

The Examiner states that he will certify the record to the Court.

F. 1393 173 Q. Were you aware of the contents of the original will of Mr. Fayerweather when you made a draft of the paper executed on November 11th?

A. On the ground of professional privilege, I must decline to answer.

174 Q. Do you know whether Mr. Fayerweather, at the time of the execution of that paper, knew or recalled the provisions of the original which, to which it was a codicil?

Mr. Bishop: That is objected to as incompetent, irrelevant and immaterial, for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. On the same grounds I must decline to

F. 1394 answer.

175 Q. Was any change made in that paper in the amounts of the bequests to the different institutions mentioned in the ninth and tenth clauses of the will?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. On the ground of professional privilege I must decline to answer.

176 Q. Was that paper the last paper which you prepared for Mr. Fayerweather to execute?

A. I had no further communications with Mr. Fayerweather after that interview, and prepared no papers.

177 Q. And prepared no other papers, you say?

A. Yes.

178 Q. Was any statement made by you to Mr. Fayerweather which will explain the preparation of a later testamentary paper by other attorneys, and its execution by Mr. Fayerweather four days after the one which was executed on the 11th of November?

F. 1395 Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. "Was any statement made by you to Mr. Fayerweather," you say?

179 Q. By Mr. Fayerweather to you?

A. On the ground of professional privilege, I must decline to answer.

180 Q. Did you know from Mr Vaughan, or anyone else, that another testamentary paper superseding or purporting to supersede the one which you had drawn on the 11th of November, was drawn by other

F. 1396 attorneys; and as is claimed, was executed by Mr. Fayerweather on the day of his death?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. That appears on the record, I believe.

181 Q. It does not appear whether you were told about it by Mr. Vaughan?

A. I do not know when I learned it.

182 Q. Do you not know that you did not learn it until after Mr. Fayerweather's death?

A. I have no recollection of knowing it until after his death.

183 Q. Did Mr. Vaughan ever make any explanation to you of how it was that after the preparation by you of this paper executed on November 11th, another paper came to be executed on the 15th of November, on the day of Mr. Fayerweather's death, and which annulled or superseded the paper executed on the 11th, or how it was that he procured other attorneys to do it, and did not leave the matter

F. 1397 after you had taken it up, in your hands?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. After Mr. Fayerweather's death, Mr. Vaughan occupied the relation of client to our office; and we acted as counsel for him in his capacity as executor; and it is very possible that he may have made some statements regarding the matter to me; I do not now recollect what they were, or when, but it is very probable that he did; if he had, however, I should be forbidden to testify to the nature of them exactly, on the ground of professional privilege; I have no

F. 1398 definite recollection on the subject, however.

184 Q. When you accepted Mr. Vaughan as a client, as executor, did you know that his claim to act as such rested upon the probate of a paper purporting to be executed on or about the 15th of November, subsequent to your paper?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. I knew to the contrary.

185 Q. Upon what did his title to act as executor, as you then understood it, rest?

Mr. Bishop: I do not think that the witness understood you, Mr. Sherman.

Witness: Yes, I did.

Mr. Bishop: I object to the question.

A. Mr. Fayerweather's testamentary papers executed prior to the date that you mention.

186 Q. And entirely irrespective of any paper executed November 15th?

A. Where is that paper of November 15th; you showed it to me a few moments ago. I do
F. 1399 not know that I ever looked at it before.

187 Q. (Handing book.) Here it is?

A. I do not think that has anything to do with it, sir. There was a previous codicil appointing him executor.

188 Q. Which one?

A. I do not know; I have not read it. "Codicil January 7th, 1888. I hereby nominate my friend, Henry B. Vaughan, of Elizabeth, New Jersey, as Executor." Now, you ask me what this title rested upon; it rested upon that codicil which, so far as I know, had never been revoked.

189 Q. When you say that so far as you know, that codicil had never been revoked, do you mean
F. 1400 to testify that the paper executed on the 11th of November, did not so far revoke it as to leave Mr. Thomas G. Ritch out altogether as executor?

A. No, sir; I did not mean to testify anything about the codicil of the 11th of November, as you are pleased to call it, because I have not testified to anything in regard to the contents of that paper, and do not intend to do so, on the ground of professional privilege.

190 Q. Then when you say that so far as you know the codicil of January 7th, 1888, has never been revoked, do you mean to qualify that in effect, by saying save and

except so far as the paper executed November 11th, 1890, may have revoked it, but whether it did or not you decline to state; is that what you mean?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea or replication; and upon the further ground, that the testimony of the witness speaks for itself.

A. No.

F. 1401 191 Q. I am calling your attention to the fact; do you mean to except that from the generality of your answer?

A. No, I do not. In a negative way you have doubtless disclosed the fact that so far as I knew the paper which you referred to did not affect Mr. Henry B. Vaughan's title as executor under the codicil of the 7th of January, 1888, because I stated that the fact of Mr. Vaughan's executorship did not come from this paper of November 15th, 1890, but from a previous paper.

192 Q. Well, in order to clear up any misunderstanding of the previous questions and answers, I ask you now whether the codicil of January 7th,

F. 1402 1888, was not revoked, in whole or part, by the paper executed on November 11th, 1890?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised in the plea and replication.

A. Upon the ground of professional privilege I decline to state the contents of that paper, or what was or was not included in it.

193 Q. When you said above, that, so far as you knew, the codicil of January 7th, 1888, which you referred to as making Mr. Vaughan an executor was not revoked, you knew it had never been revoked;

you did not intend, did you, even by inference to state the contents or effect of the paper executed November 11th, 1890? A. No.

Adjourned to 2 P. M.

F. 1403

AFTER RECESS.

194 Q. When you entered the room where Mr. Fayerweather was, on the 11th of November, were you introduced to him?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, for the reason that it calls for no evidence competent or material to the issues raised in the plea and replication.

A. Yes.

195 Q. Do you remember by whom?

Mr. Bishop: I object to the question as in-
F. 1404 competent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised in the plea and replication.

A. I do not remember.

197 Q. Was it by Henry B. Vaughan?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. I do not remember.

197 Q. Was Mr. Henry B. Vaughan present when you first saw Mr. Fayerweather on that occasion?

A. That I do not recollect.

198 Q. Did you go to the house with him, or alone?

A. Alone, is my recollection.

199 Q. Was he there when you arrived?

A. I do not recollect.

200 Q. Did you see him there at all while you were there?

A. I do not remember.

201 Q. In what part of the house was this paper executed?

F. 1405 A. The second story room.

202 Q. The front room or back room?

A. Front.

203 Q. Where you sitting at a table when it was done, in the front room?

A. My recollection is that Mr. Fayerweather was seated in a chair with the back of the chair towards the wall, and that there was a small table beside him, but I was not seated at the table.

204 Q. Let me see if I can refresh your recollection. Was there not a table there with a drawer in it that was pulled out to get some papers, during some part of the transaction?

A. I do not recollect any such thing; I think
F. 1406 there was a small table beside Mr. Fayerweather.

205 Q. You say the back of his chair was towards the wall, do you mean the side wall of the house, or the front wall?

A. No, as I recollect the plan of the house, it was—

206 Q. North and south on the north side of 57th street?

A. The room in which I was was in a house on the north side of 57th street, the entrance I should say was on the east side of the house, and the room I was in was quite a large room on the second story, fronting south on 57th street; and Mr. Fayerweather was seated

near the back of the room, against the easterly wall of the room, with the back of his chair toward the easterly wall.

207 Q. Do you mean the east wall?

A. Yes. Suppose that was the south, he was over there where that bookcase is (indicating). The easterly wall of the room, near the back of the room, and there was a small table beside him.

208 Q. Well, was it a table five feet long by three and a half wide, or such a matter?

F. 1407 A. No, my recollection is it was a small table.

209 Q. Well, where was the ink that was used in making the signature; was it on the table, the ink bottle?

A. I do not know.

210 Q. The pen was dipped in ink, was it not, before he signed his name?

A. I do not remember.

211 Q. Don't you remember whether he wrote it in ink?

A. I was not a witness to the execution of the paper.

212 Q. You saw him sign it, did't you?

A. I think I will have to decline to answer that, on the ground of professional privilege.

F. 1408 213 Q. What, after you have said that the paper was executed there? You have said it was executed there?

A. No.

214 Q. At what point do you draw the line of professional privilege? When you have said that the paper was executed there, does the privilege extend to the question of whether the signature was written with pencil or with ink?

A. Well, I have stated already that I do not recollect anything about it, Mr. Sherman, I do not think it worth while to discuss that.

215 Q. I understand you to decline, on the ground of privilege?

A. Yes. I believe I have stated in the course of my examination that Mr. Fayerweather did execute a paper, in the presence of witnesses, on that day and on that occasion.

216 Q. That paper that you went through the statutory form of attestation?

A. And that I read a certain sentence to the witnesses at the time.

F. 1409 217 Q. If you do not feel bound by professional privilege after that, will you simply say what your recollection is about pencil or ink?

A. It was undoubtedly executed in ink and signed in ink, by Mr. Fayerweather.

218 Q. But you do not remember where the ink was obtained, or the pen?

A. I have no distinct recollection on the subject; I presume that it was from an ink-bottle on the table.

219 Q. Who was present besides Mr. Fayerweather and yourself?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to

F. 1410 the issues raised by the plea and replication; and upon the further ground, that the question has been already asked and answered.

A. At the time of the execution of the paper, the three witnesses, Miss Joyce, I think, was the lady's name, and the two doctors.

220 Q. Was Mr. Fayerweather, as you then observed, quite hard of hearing?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. Not as I observed.

221 Q. You were not aware of the necessity of speaking to him in a loud voice, in order to be clearly heard?

A. No.

222 Q. And you said what you uttered in his presence, without being aware of any such necessity?

A. Yes, sir.

223 Q. What fact can you state which shows that he heard whatever you said, whatever it was?

A. I must decline to answer on the ground of professional privilege.

F. 1411 224 Q. Did you speak in a tone of voice which would enable the other persons in the room to hear everything you said to him?

A. My impression is that I did not.

225 Q. Did you make any conscious effort to speak so they would not hear?

A. I appreciated the fact at the time, that my interview with Mr. Fayerweather was a private one, and the other persons in the room had withdrawn, as far as possible, to the corner of the room by the window in 57th street; I think my back or three-quarters back, was towards them at the time of my talking with Mr. Fayerweather.

226 Q. You were not more than ten feet
F. 1412 away from them, however, were you?

A. Oh. I should say yes, more than that.

227 Q. Do you know how large that room is, how long it is the longest way of it? What is your judgment about that?

A. You ask my recollection about it; of course I have not measured the room.

228 Q. Of course I mean your judgement?

A. I should say the room was fifteen feet by twenty-two.

229 Q. And you were about the middle of it, were you not, of the long way of it, when you were at the table, or near that table?

A. No, I should say that I was nearer the
F. 1412 door, that is, if the door———
230 Q. The north door?
A. The north door of the room.
231 Q. And they were at the south window, is that what you say?
A. They were at the south-westerly window.
232 Q. Well, was there not a space of ten feet or so, between you and the northerly wall of the room, as you then were ?
F. 1413 A. Oh, no, I say—my recollection is that I was only a few feet from the wall.
233 Q. Well, how many—about how many?
A. Oh, about five.
234 Q. Were you as close to the wall as that?
A. That is my recollection.
235 Q. Then these people———
A. I may be all wrong, you know.
236 Q. Is it your impression that there was a distance of as much as fifteen feet between you and the other people in the room, other than Mr. Fayerweather?
A. Yes, fully that.
237 Q. Fully that? A. Yes.
F. 1414 238 Q. Did these other people retire upon any intimation from you or Mr. Fayerweather that their presence there was not desired, or that the matter was private; or was its privacy merely remaining in your mind, or covering what you did?
A. My impression is, I understood—
239 Q. No, I did not ask you what you understood. What was said by either you or Mr. Fayerweather?
A. You are asking my impression?
240 Q. No, I ask you what said by either you or Mr. Fayerweather to convey that impression to them?
A. I do not recollect what was said.

241 Q. Well, do you recall that anything was said of that character?

A. I know that something was said to intimate to them the privacy of the interview.

242 Q. By whom, you or by Mr. Fayerweather?

A. I think by me.

243 Q. Look at page 781?

A. My recollection is that one of these persons who afterwards acted as a witness, either Miss Joyce or one of the doctors, asked me if they should leave the
F. 1415 room, and I said no; that is my recollection; and they withdrew, upon that, to the window.

244 Q. Did you ask them not to listen?

A. I did not.

245 Q. Were they within hearing distance?

A. I do not think so.

236 Q. Did you read the paper in such a voice that you were satisfied in your own mind that Mr. Fayerweather heard all you read?

A. Yes.

247 Q. Did Mr. Fayerweather make any statements that you can recollect, of what he understood to be the effect of the paper which you had read to him?

Mr. Bishop: I object to the question as in-
F. 1416 competent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. I must decline to answer that on the ground of professional privilege.

548 Q. Did you make any statement to persons in the room, other than you, on that subject.

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. I have no recollection.

249 Q. Did he make any statement to you from which it was obvious to you that he was willing the others should hear, or that he intended the others should hear?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. I have no recollection of his doing so; my recollection is that he did not.

250 Q. Do you know what became of this pa-
F. 1417 per after it was signed by the witnesses?

A. I do not.

251 Q. Was it left with Mr. Fayerweather when you came away?

A. I have no recollection on the subject.

252 Q. Your recollection about it ends with the signature of the witnesses, does it?

A. Yes.

253 Q. Did you ever see it again after that?

A. I never did.

254 Q. Did you read the subpœna which was served upon you in this proceeding?

A. Yes I did.

F. 1418 255 Q. Have you in your possession, or under your control, any of the writings described in that subpœna?

A. Have you got a copy of the subpœna?

256 Q. (Handing paper.) Yes, that is a duplicate original? A. No.

Mr. Sherman: Mr. Butler, I have not concluded your examination, but necessarily we are at a stand still so far as your testimony is concerned, until the Court shall have ruled upon the propriety of your objections. Now, I want to make an application to the Court in the way which would be most respectful and convenient for you; and I suggest that if it would be agreeable to

you we make some stipulation of record on that subject, instead of my applying for an attachment, and all that.

The Witness: I do not know the practice; you had better go ahead in the regular way, whatever it is.

Mr. Sherman: If you will accept notice of the motion to compel you to answer for the next motion day, before whatever Judge sits, I will simply leave it in that way. If you want me to make an affidavit and get an attachment, you understand that I have to take those formal and inconvenient and undesirable

F. 1419 steps. Theoretically from our point of view, you are a contumacious witness. I desire to adjourn the further examination of this witness:

The Witness: I shall consider the subpœna holds, and I will come here whenever you get this question argued and are ready to proceed. You can adjourn it without fixing a day.

Counsel for complainants asks Examiner to certify to the Court the record and the various refusals of the witness to answer the interrogatories.

The Examiner states that he will so certify.

F. 1420

NEW YORK, October 25th, 1898.

Met pursuant to adjournment. Present: The Examiner, Mr. Sherman, Mr. Blaikie, Mr. Root, Mr. Hume and Mr. Choate.

Continuation of the examination of *PRESCOTT HALL BUTLER.*

By Mr. Sherman.

256 Q. Mr. Butler, I invite your attention to the de-

cision of the U. S. Circuit Judge upon your objections to make answer to questions upon the last session which you attended, page 170 of the examiner's minutes, and I will ask you to please read that order therein contained.

A. I have read it.

257 Q. Was a paper prepared by you as counsel in fact signed by Daniel B. Fayerweather in the presence of attesting witnesses in the form and manner to constitute a valid publication of said paper as a
F. 1421 testamentary document?

A. A paper drawn by me as counsel for Mr. Fayerweather was executed by him before witnesses and declared by him to be a codicil to his last will and testament in the presence of the witnesses who signed as such witnesses at his request after such declaration.

258Q. Do you mean that they did so in the form and manner to constitute a valid publication of said paper as a testamentary document?

A. I do not understand that a paper is a testamentary document until after the decease of the person executing it.

259 Q. Well, so far as a man can make a valid
F. 1422 publication of a paper which may become a testamentary document after his decease, was that attestation of this paper in question in such form and manner as to constitute such a valid publication?

A. Not as I understand the word publication, no.

260 Q. Do you understand that a man may make a publication of his will prior to his decease?

A. I do not understand what the meaning of the word publication in that connection means.

Mr. Sherman: I move the examiner to certify the further examination of this witness to the Court, in order that the Court may instruct the witness as to the

meaning of the Court in the order which it has made.

The Witness: I have stated, Mr. Sherman, what the facts were, that Mr. Fayerweather signed the paper and declared it to be a codicil to his last will and testament in the presence of witnesses and requested them to sign as such, and thereupon they did.

261 Q. And thereupon you left it in his custody, did you not?

A. I did.

F. 1424 262 Q. And went away? A. I did.

263 Q. And you have never seen it since?

A. I have.

264 Q. Do you know the contents of that paper?

A. I believe that I do.

265 Q. I ask you to state the contents of that paper.

Mr. Choate: Before answering that I should like to ask Mr. Butler a question.

Mr. Sherman: I object to that. Mr. Butler is a witness and the record is in the hands of the parties.

The Examiner: The witness is with Mr. Sherman now.

Mr. Root: May I not ask a question which will determine the admissibility of the evidence

F. 424 when it comes before the Court?

Mr. Sherman: I object to any interpolation now.

Mr. Root: I will put this question.

Mr. Sherman: I object to the question being taken; the witness is with me. It is entirely irregular to interrupt the examination in that way.

The Examiner: You may make a statement there that you want to ask a question and I will rule upon it.

Mr. Root: I request the Examiner to ask Mr. Butler now whether Mr. Fayerweather communicated the

contents of the instrument signed by him as the witness has testified to the witnesses or to any one else upon the occasion to which his testimony refers.

Mr. Sherman: I object to that. The examiner rules that the objection of Mr. Sherman is valid, the witness being on direct-examination, the counsel for defendant has no right to ask the question at this stage.

Mr. Choate: Then the witness answers that under advice and for the purpose of getting the decision of the Circuit Court of Appeals upon the question
F. 1425 of privilege arising and because of such privilege he declines to answer, and further states that upon the occasion referred to in his preceding answer Mr. Fayerweather made no communication to the witnesses or either of them as the contents of the instrument or any part thereof.

Mr. Sherman: I ask the examiner to state on the record in advance of this answer the fact that it was uttered by the lips of Mr. Choate, as the fact is.

The examiner states that he will so state.

Mr. Sherman: Now I move to strike out all the statement following the refusal to answer. on the ground that Mr. Choate is not a witness under oath and cannot depose to these matters in lieu of the witness;
F. 1426 and I ask the examiner to certify the refusal of the witness to answer forthwith to the Court.

The examiner states that he will so certify.

The Witness: I will, Mr. Sherman, in answer to your question state—

Mr. Sherman: I object to any further answer to the question; I have had a refusal to answer.

PRESCOTT HALL BUTLER.

Sworn to before me this 6th day of March, 1899.

JOHN A. SHIELDS,
Examiner.

TESTIMONY OF DAVID N. CARVALHO.

COMPLAINANTS' PROOFS.

NEW YORK, February 13th, 1901.

Met pursuant to adjournment. Present: The Examiner, Mr. Sherman, Mr. Blaikie, Mr.
F. 1427 Mr. Carnochan, Mr. Fain, Mr. Stimson, Mr. McLaughlin, a representative of Nash & Jones, and a representative of Russell & Holmes.

Mr. Sherman: I call Mr. David N. Carvalho.

Mr. Bovee: Now, Mr. Examiner, I think you had better not go yet. I object to the examination of Mr. Carvalho at this time. This is a new scene in the play.

Mr. Sherman: May I go on with Mr. Carvalho?

The Examiner: Yes, under his objections.

Mr. Bovee: With the reservation that if I do
F. 1428 not see fit to cross-examine him, his cross-examination will be adjourned.

The Examiner: Yes, if you do not want to cross-examine him to-day, you may have until to-morrow to cross-examine him.

Mr. Sherman: I do not assent to any such reservation. We cannot bring this man back another day. He ought to be examined to-day.

The Examiner: If he cannot conclude to-day, it will go on another day.

Mr. Sherman: Of course, if there is not time.

The Examiner: Let us go on as far as we can.

TESTIMONY OF DAVID N. CARVALHO.

DAVID N. CARVALHO, called as a witness on behalf of complainants, being duly sworn, testified as follows:

Direct examination by Mr. Sherman:

1 Q. What is your occupation?

A. Examiner of questioned handwriting, inks and paper.

F. 1429 2 Q. And how long have you been engaged in that business?

A. Slightly over 25 years.

3 Q. Have you frequently been an expert witness upon the trial of issues involving such questions?

A. Many hundreds of times.

4 Q. Will you state in what courts and in what line of cases you have so testified?

A. United States Criminal and Civil Courts, State Criminal and Civil Courts, criminal cases, civil cases, patent cases, I presume almost every kind of contest that come in the courts, and distributed through nineteen States, sir.

F. 1430 5 Q. Do you recall any of the notable will cases in which you have been an expert witness?

A. Yes, sir.

6 Q. What are they?

A. In California, the Fair will case; in Montana, the Davis will case; in New Jersey, the Gordon will case; in New York City, the miser Paine case, the Richardson case; I suppose altogether, while I cannot give you the names at the moment, I may have testified in 150 will cases, sir, perhaps more than that.

7 Q. (Handing papers.) I show you the last will and testament so-called, of Daniel B. Fayerweather, marked Complainants Exhibit 1, January 24, 1901, and also what purports to be the second codicil thereof,

which has been marked Complainants' Exhibit 3, January 24, 1901, also what purports to be the third codicil to that will, which has been marked Complainants' Exhibit 4, January 24, 1901, also what purports to be a codicil to that will dated December 13, 1884, which has been marked Complainants' Exhibit 2, January 24, 1901, and also what purports to be a fourth codicil to that will dated November 15, 1890, which has been marked Complainants' Exhibit 5, January 24, 1901.

I ask you to look at the signatures to those
F. 1431 five papers and to state whether in your opinion the signatures on the Complainants' Exhibit 6, of January 24, 1901, are fac-similes of the original signatures upon the papers produced?

(At the request of Mr. Bovee Question No. 7 was repeated by stenographer.)

Mr. Bovee: Defendants object on the ground that it is irrelevant and immaterial to the issues presented upon the special pleas, and incompetent and irrelevant and immaterial to any possible issue in this case.

A. The photographed representations of the five signatures attached to the five papers purport
F. 1432 to be———

8 Q. Marked Complainants' Exhibit 6, January 24, 1901?

A. Marked Complainants' Exhibit 6, January 24, 1901, purport to be fac-similes and are to all intents and purposes fac-similes of such signatures.

9 Q. (Handing photograph.) Look at the Complainants' Exhibit 7, of January 24, 1901, and state whether the photograph thereon, the print thereon, is a fac-simile of the indorsement on the said codicil dated November 15, 1890.

Mr. Bovee: Defendants object on the ground that it is irrelevant and immaterial to the issues presented

upon the special pleas, and as incompetent, irrelevant and immaterial to any possible issue of this case.

A. The photograph purports to be and is——

10 Q. Won't you identify it by the number?

A. Yes, sir, it is marked Complainants' Exhibit 7, January 24th, 1901 — purports to be and is to all intents and purposes a fac-simile of the exhibit marked Complainants' Exhibit 5 of the same date, the indorsement being referred to.

11 Q. (Handing photograph.) Look at the F. 1433 photograph or the print upon the card which I now hand you and state whether that is a fac-simile of the last four lines of the body of the codicil dated November 15, 1890, above the signature D. B. Fayerweather, and whether the remainder of the print is a fac-simile of the attestation clause and signatures thereto of that codicil.

Mr. Bovee: Defendants object on the ground that it is irrelevent and immaterial to the issues presented upon the special pleas, and irrelevant and immaterial to any possible issue in the case, and incompetent, and it being an inquiry of the witness as to a paper which is not an exhibit in the case and not proven to to be a correct photograph of any exhibit in F. 1434 the case.

A. The photograph referred to purports to be and is a correct reproduction of all that appears on the last page of the codicil referred to, and is to all intents and purposes a fac-simile of the same, sir.

Mr. Sherman: I ask to have it marked in evidence.

Mr. Bovee: Defendants object to it as irrelevant and immaterial to the issues presented upon the special pleas, as incompetent, it appearing to be a photograph and not having been shown to have been accurately and properly taken in order to properly reproduce the original.

The photograph was marked Complainants' Exhibit No. 10, February 13th, 1901, C. B.

12 Q. (Handing paper.) Please look at the codicil dated November 15, 1890, marked Complainants' Exhibit 5, January 24, 1901, and state whether you are able to form an opinion as to whether the three signatures below the attestation clause were made with the same ink, I mean the signatures of Elizabeth R. Joyce, J. Prentiss Browning, and Edward
F. 1435 Marshall Grout.

Mr. Bovee: We object upon the ground that it is irrelevant and immaterial to the issue presented on the special pleas or to any possible issue in this case, also upon the ground that it is incompetent.

A. I have formed an opinion, sir.

13 Q. State what it is?

Mr. Bovee: Same objection.

A. There are two inks, two inks have been used in the making of the three signatures. The first signature, Elizabeth R. Joyce, and the second signature, J. Prentiss Browning, constitute one ink and one kind of ink, the Edward Marshall Grout is in a second, another kind of ink.

F. 1436 14 Q. Have you an opinion as to whether the three signatures were written with the same pen?

Mr. Bovee: Same objection.

A. I have an opinion, sir.

15 Q. What is it?

Mr. Bovee: Same objection.

A. They were not.

16 Q. Have you an opinion as to whether the date, 15th, in the second line above the signature of D. B. Fayersweather, is in the handwriting of either of the attesting witnesses.

Mr. Bovee: Defendants object upon the ground that

it is irrelevant and immaterial to the issues presented upon the special pleas, and incompetent.

17 Q. What is it?

A. I have an opinion.

Mr. Bovee: Same objection.

A. That Edward Marshall Grout, being the writer of the signature as witness appended to this document, Edward Marshall Grout wrote the words 15th in the second line above the decedent's signature.

18 Q. Please look at the indorsement upon that codicil, that paper, and state whether you have
F. 1437 an opinion as to whether that indorsement is in the handwriting of either of the attesting witnesses?

Mr. Bovee: Defendants object upon the ground that the matter is irrelevant and immaterial to the issues presented upon the special pleas, irrelevant and immaterial to any possible issue in the case, and incompetent.

A. I have an opinion.

190 Q. What is it?

Mr. Bovee: Same objection.

A. That it was written by one of the attesting witnesses to this document.

F. 1438 20 Q. And by whom?

Mr. Bovee: Same objection.

A. By the person who signs himself Edward Marshall Grout.

21 Q. Have you an opinion as to whether the indorsement on that paper was written with the same pen with which the name of Edward Marshall Grout was written?

Mr. Bovee: Defendants object upon the ground that it is irrelevant and immaterial to the issue presented upon the special pleas, irrelevant and immaterial to any possible issue in the case, and incompetent.

A. I have an opinion.

22 Q. What is it?

Mr. Bovee: Same objection.

A. That it was; that is to say so far as anything appearing in the handwriting of Mr. Grout on the indorsement down to the waved line.

23 Q. The upper waved line?

A. Yes, the upper waved line, underneath the words Daniel B. Fayerweather. In respect to the words, dated November 15th, 1890, that that was not written with the same pen as was the writing which precedes it.

24 Q. Have you an opinion as to whether
F. 1439 the last line dated November 15, 1890, was written with the same ink as that above it?

Mr. Bovee: Same objection.

A. I have an opinion.

25 Q. What is it?

Mr. Bovee: Same objection.

A. That it was not.

26 Q. Have you an opinion as to whether the indorsement of the paper or any part of it was written with the same ink with which were written the signatures of Elizabeth R. Joyce and J. Prentiss Browning?

Mr. Bovee: Same objection.

A. I have an opinion.

27 Q. What is it?

F. 1440 Mr. Bovee: Same objection.

A. That it was; that is to say, the words dated November 15th, 1890, that portion of the indorsement.

28 Q. Was what?

A. Was written with the same ink as was used in the writing of the words Elizabeth R. Joyce and J. Prentiss Browning, appearing as witnesses to the indorsement.

29 Q. Have you had any experience in judging of assisted handwritings?

A. Yes, sir, and supported handwritings.

30 Q. Will you explain what is meant by assisted and

supported handwritings when spoken of by experts in handwriting?

Mr. Bovee: Defendants object upon the ground that it is incompetent, irrelevant and immaterial.

A. A supported handwriting is simply to steady the hand of the writer so as to enable him or her to write with less trouble than they would do under other circumstances if the circumstances were such that the hand, due to physical and mental causes, was unable to perform its functions.

F. 1441 An assisted is the placing of the hand of a writer and assisting the person, not only to steady the hand, under like circumstances to which I have called attention in speaking a supported hand, but to assist them to write, whether intentionally or otherwise.

31 Q. (Handing paper) Look at the signature of the paper purporting to be the fourth codicil marked Complainants' Exhibit 5, January 24, 1901, I mean the signature on the fifth line running to the seal and over it, and state whether, assuming that the signatures of the other four testamentary papers in evidence to be genuine, you are able to form an opinion as to whether the same hand, under the impulse of the same mind,

F. 1442 wrote the signature to the codicil of November 15th, 1890, which wrote the signature to the other four testamentary papers?

Mr. Bovee: Defendants object on the ground that it is irrelevant and immaterial to any possible issue at large in the case, irrelevant and immaterial to the issues raised upon the special pleas, incompetent and calling for the opinion and the conclusion of the witness.

A. I recognize, assuming——

32 Q. This is a preliminary question as to whether you are able to form an opinion, Mr. Carvalho?

A. Generally, yes, sir.

33 Q. State what your opinion is in that respect and the grounds for it?

Mr. Bovee: Defendants object on the grounds that it is irrelevant and immaterial to the issues at large in the case, and irrelevant and immaterial to the issues raised upon the special pleas, incompetent, calling for the opinion and conclusion of the witness.

A. Compared with the four other signatures appended to the four other instruments re-
F. 1443 ferred to, and which I accept as standards of the genuine handwriting of D. B. Fayerweather, the D. B. F. and the jumble which follows the same, which in the absence of the genuine signatures I would be unable to select a single letter or to make a context in order to determine what it meant, I do recognize some of the elements which constitute the habits and methods of D. B. Fayerweather illustrated in the four signatures referred to but the same conditions are abnormal. The signature, taken as a whole, and assuming it to be meant for the words, the intention to write the words D. B. Fayerweather, and assuming that they stand for that, must have been put there under strange and
F. 1444 abnormal circumstances. It does not appear to me that the hand able to produce and make the two capital letters, D. B., part of which lines are made with care, deliberation, and more or less artistic beauty, parts of which are disturbed and troubled, and hesitating, and departing largely from the habits of the writer to be found in the admitted signatures, that that same hand, under the same conditions which produced the letters, D. B., would have produced what I have denominated a jumble under the same conditions. In other words if D. B. Fayerweather wrote the D. B. and in the length of time that it took him to write it, assuming that he

approximated at least the time which is illustrated in his admitted signature, in my opinion he would have made a signature more legible, so far as his last name is concerned, than what appears on the instrument referred to. Consequently I am impressed with the belief that that combination, the D. B., the "F" followed by the jumble, could not have been put upon the paper except more than one person had to do with it, and that at least the D. B. was supported.

His hand was supported, assuming that the
F. 1445 F was unsupported, and that the Fayerweather
what purports to represent the Fayerweather, perhaps illustrated his then condition and ability to write. This assumption of mine, or opinion, which I have called attention to, I form from a careful comparison not only of the signatures of Mr. Fayerweather which are admitted but from other writing which I find on this same document, and I call attention now specifically and in detail to some of what I have denominated abnormalities. In no instance illustrated in the four admitted signatures do I find any habit of Mr. Fayerweather to make a dot or a mark preceding the making of his capital D, and yet I find a distinct
mark a little ways above the loop, the left
F. 1446 loop of the capital D, and I find another distinct
mark above the base line, also directly in front of the capital F. Those are two dots or marks that are independent and separated from any lines of writing in that signature. But a further examination under the glass discloses that not only are there present two independent marks, but there are a series of other dots present in that signature that attach themselves to certain portions of the signature, and I will call attention to them specifically. The first appears at the base of the first stroke of the capital B. There is a distinct dot that has been put there as an independent mark, but has joined with the staff, the second is to be found at the

base of the capital F, that is to say the down stroke travelling down towards the base line, the pen was lifted, then another small stroke was made which carried it to the base line, and then immediately below the base line would be found this dot again, but joining forces with the perpendicular line. The third dot which is attached is to be found at the top of the staff of that same F immediately above what purports to be a cross running through the staff of the F which separates it and makes it an f as dis-
F. 1447 tinctive from a t, I find another placing down of a pen mark which is attached to the staff of that line. No. 4 at the base of the connecting line following what would be a small a in the word, if it reads the word Fayerweather, at the base of the connecting line, following the a and which would join to the F, there is another distinct dot which touches the bottom of that so-called v form running from the final stroke of the a to the top of the y. The fifth is before the base of what would constitute, following out the context as reading Fayerweather, what would constitute the first member of the w. At the bottom of the first member is to be seen another dot right at the very bottom of the v portion of the first member of the w, and a
F. 1448 like dot located in the same position for what would constitute the second member of the w, so that at the base of the first member of the w and at the base of the second member of the w in each instance we find this peculiar dot. No. 7 is the connecting stroke from the a to what might be a t assuming that the letters run in order and that the letter t ought to be present there, and that the final stroke from the a running up to the t as it leaves itself to reach up in a perpendicular line, we find another dot. The eighth is a line to the left of the so-called t at its base, and I find there still another dot. So that we have two independent dots put down which do not disturb or

interfere in any way with the writing, and we have eight dots which have been placed there, which are there in fact, which do not disturb and affect the other lines of the writing. I also find in running through the admitted handwriting of Mr. Fayerweather that when he makes the first stroke of the capital D he writes down, and where there is a base line approximates it largely. In completing his stroke after having made the D and before it joins forces with the B, his habit seems to be to make a down stroke
F. 1449 which is carried up to the apex to the staff to the base. That peculiarity does not obtain in the signature to the codicil of November 15, 1890, neither is his habit in the making of the second member of the D to strike down to the base line; he lifts and makes a combination mark which looks like a figure 8 that doubles over, it does not strike the base line, nor does it trend even in that direction, while even in the signature to the codicil of November 15th, that member is brought smack down to the base line and sits on it, both the first member of the D and the second member of the D. The line which runs from the D to the B in his admitted signatures to an inverted line, while the line which runs from the D to the
F. 1450 B in the November 15, 1895, codicil is horizontal. His habit also seems to have been that in the makin———

34 Q. Won't you explain there what you mean by an inverted line?

A. I mean to say that it is convex. In other words in the D. B. the connecting line between the D and the B in the November 15, 1890, signature it almost parallels itself with the ruled lines on which the writing appears, while in his habits of writing illustrated in the other four signatnres travel at an angle of about 45 degrees, it bends and turns and runs up to the apex of the staff of the B. I find also that his

habit, illustrated in the four admitted signatures, in the making first his D in connecting the upper and lower members of it and that it locks and has a definite and positive lobe represented something like a figure 3, that portion of the B while in the signature attached to the paper dated November 15th, 1890, there is neither any locking there or any attempt or suggestion that one was attempted to be made. When we come to the Fayerweather, or what purports to be the Fayerweather, it is a mass of hie-
F. 1451 roglyphics without form and little shape, and it becomes almost impossible to make a fair comparison as between the admitted writings. The D. B., as I have called attention, sits almost squarely on the base line, and in the very definite and positive way in which it has been made, and the very indefinite and curious way in which the word Fayerweather appears, I am led to the conclusion that there is a cause for it, and that cause is an unnatural cause, even conceding that the person who wrote that signature could only write as good as in Fayerweather, he could not have written as well as appears in the D. B., and that being so I am impressed with the belief that that signature, at least in part,
F. 1452 constitutes either an assisted or a supported hand.

35 Q. I will ask you now to examine the endorsement on the paper purporting to be a codicil dated November 15, 1890, and to state whether the writer of that endorsement has any characteristics in the forming of his letters which appear in any part of the signature to that paper of D. B. Fayerweather?

Mr. Bovee: Defendants object as irrelevant and immaterial to the issues presented upon the special pleas, and as irrelevant and immaterial to any possible issue in the case at large, and incompetent, calling for the opinion, speculation and conclusion of the witness.

A. Referring to the capital D, and assuming the endorsements appearing on this document of November 15, 1890, to be a fair illustration of that person's handwriting, his habit is also to strike down with the second member of the D to the base line, and that habit obtains in the signature in dispute—I say in dispute in the sense that I am making a comparison with that and the other four signatures.

36 Q. You mean the signature to the codicil of November 15th?

F. 1453 A. Yes, sir.

37 Q. Point out please the resemblance, if there be any resemblance, in the making of the D between the endorsement on the codicil and the writing of the signature on the face of the codicil?

Mr. Bovee: Same objection.

A. That seems to be, sir, really the only strong definite thing that I can call specific attention to. The quality of hand illustrated in the signature attached to the document of November 15th, which seems to me relatively the same strength of down line as of up line, in that respect does not obtain and fulfill what we find in the four admitted signatures, where the habit illustrated there is to make his down

F. 1454 strokes with more definiteness and pressure than his up strokes.

38 Q. Does the D in the signature to that codicil differ from the D in the other four signatures to the other testamentary papers in evidence in any respect, and if so, in what respect?

Mr. Bovee: Defendants object as irrelevant and immaterial to any special issue in the case and incompetent, calling for the opinion, speculation and conclusion of the witness.

A. So far as type of letter it typifies the admitted signatures, but so far as manufacture is concerned in the putting of it together, it is differently drafted and

differently made, there is another effort there that does not appear to me to have applied altogether to the writer of the admitted signatures.

39 Q. In regard to the habits of handwriting, are you able to say whether a peculiarity or characteristic such as you say appears in the four admitted signatures in regard to the second or right hand side of the D, the habit being as you state not to bring it down to the line, persist and prevail?

Mr. Bovee: The counsel for the defendants
F. 1455 objects to the question as improper in form and leading, and irrelevant and immaterial to the issues presented upon the special pleas or to any possible issue in the case, incompetent, in calling for the opinion and speculation and conclusion of the witness.

A. The handwriting as illustrated in the four admitted signatures is a settled writing, and in my opinion the peculiarity to which you have called attention, obtained you might say as one of the habits of a lifetime in writing would be persistent, and if in running through a thousand signatures of this person, while you might find a variation so far as distance removed from the base line, I am of the im-
F. 1456 pression that his habit was to always write away from the base lines and that the four signatures represented here constitute a fair representation of his characteristics of hand.

40 Q. Based upon the statement that you have made, what is your opinion as to whether the hand and mind of the person who wrote the endorsement on that codicil participated in the forming of the signature to the codicil of D. B. Fayerweather?

Mr. Bovee: Defendants object to the question as irreelvant and immaterial to the issues presented upon the special pleas, and irrelevant and immaterial to the issue at large in the cause, incompetent, calling for

the opinion and speculation and conclusion of the witness and not for a fact.

A. I am only able to go a certain distance in formulating an opinion in respect to disputed handwriting based upon my own personal experience, and do not intend and will not sail into the land of metaphysics, and consequently up to a certain limit I am prepared to go, and that is that the physical condition of the person that wrote that signature or any part of it was exceedingly abnormal as com-
F. 1457 pared with the condition of the person who wrote the four admitted signatures, and that being, assuming that that is the signature of D. B. Fayerweather, it must have been written under most extraordinary circumstances, abnormal in character.

41 Q. Does your experience enable you to draw any deduction or conclusion as a matter of expert opinion from the circumstances pointed out by you that the four established signatures of D. B. Fayerweather have the peculiarity which you have pointed out in regard to the D, that the second or right hand half is habitually not brought down to the line, in connection with the fact pointed out by you that the habit of the person who endorsed the codicil of November 15th
F. 1458 is to bring the right half of the D down to the line, and also in connection with the fact that the D in the signature to the codicil of November 15th, that is the right hand half of the D, is brought down to the line?

Mr. Bovee: Counsel for the defendants objects to the question as improper in form and leading and he further objects on the ground that the matter is immaterial and irrelevant to the issues presented upon the special plea or any possible issue in the case, and incompetent as calling for the opinion and conclusion and speculation of the witness and not for facts.

A. The mere fact that the D illustrated on the

back of the codicil of November 15th, 1890, the second part is brought to the base line, taken independently is of no value because it is a very common thing for individuals to do that, it is the correct thing to do. If, however, the person who wrote the endorsement on the codicil of November 15th, 1890, his hand was on the hand of the person who was alleged to have written the signature attached to the instrument dated November 15, 1890, I would expect to find that the habits of the stronger hand, the stronger mind,
F. 1459 would consciously or unconsciously exert themselves and result in—and produce results of his own handwriting, like his own handwriting.

42 Q. Assuming that the signature to the alleged codicil of November 15, 1890, was placed upon that paper not more than ten hours before the death of D. B. Fayerweather, and while he was dying of consumption, assuming that he had not been able to take food or swallow for eighteen hours before his death, assuming that his attending physician had announced him to be in a dying condition as early as twelve o'clock, on that day, assuming that one Edward Marshall Grout, whose name appears upon the paper as an attesting witness, had brought the paper to him about from one to two o'clock on
F. 1460 the 15th of November, 1890, and had handed him the pen with which the name was written, assuming that Edward Marshall Grout had held or sustained his hand while the name was being placed upon that paper, and assuming that Edward Marshall Grout, within a few minutes after the placing there of the name of D. B. Fayerweather had in the same house and before going away made the endorsement in the photograph marked Complainants' Exhibit 7, January 24, 1901, are you able to say in connection with the other circumstances which you have just pointed out in regard to these handwritings whether the signature to the codi-

cil establishes the unaided and independent act of D. B. Fayerweather?

Mr. Bovee: Counsel for the defendants objects to the question as improper in form, leading and hypothetical. We object to the matter sought to be elicited upon the ground that it is immaterial and incompetent to the issues upon the special pleas and irrelevant and immaterial to any possible issues in the case, and incompetent, and calling for the opinion and conclusion of the witness and speculative and

F. 1461 assuming facts not proven in the case.

A. Assuming the facts to be true in the question propounded, it would be, in my opinion a reasonable deduction that the curious phenomenon which appears in the signature attached to the codicil of November 15, 1890, was brought about in just such a manner. The spreading of the space or the widening of the usual space——

43 Q. What do you mean by in just such a manner?

A. I mean to say we would have just such a curious phenomenon present, what I have termed an abnormality, something which has been introduced by means that were not of his own, that were not employed altogether by himself, and the wide

F. 1462 spacing that exists in the signature attached to the codicil dated November 15, 1890, illustrated——

44 Q. The spacing between what?

A. Between the D and the B which does not obtain to any such marked degree in the admitted signatures, is illustrative of something characteristic of that kind, of two hands instead of one; that is to say, taken in connection with what else appears here.

45 Q. I invite your attention to the fact that the signature of D. B. Fayerweather upon the codicil of November 15, 1890, is commenced at a point so near

the seal that the end of the signature is upon and over the seal which does not appear to be the case in any of the other papers, and ask you whether, as a matter of expert opinion, the circumstances that the signature was commenced at a point which would not permit of its being concluded clear of the seal has any sigificance, and if so, what?

Mr. Bovee: Counsel for the defendants objects to the question as improper in form and leading,
F. 1463 and objects to the matter sought to be elicited as irrelevant and immaterial to the issues presented by the special pleas, and irrelevant and immaterial to any possible issue in the case, and incompetent calling for the opinion and speculation of the witness.

A. This is a circumstance, sir, that might be due to several causes. One might be inability to see, the shifting of the paper, several causes. The fact is present and patent, however, that the writer did travel over and compete the so-called signature on the seal, from what specific cause that came I am unable to specify, it is a matter of surmise; but it is not his usual habit, which we find illustrated in the four
F. 1464 admitted signatures, where a considerable space is found between the seal and the final stroke of the signature.

46 Q. Assume, in connection with the facts assumed in the last hypothetical question, that Mr. Fayerweather had impaired vision, that he could only see writing with spectacles of powerful lenses, supplemented by a powerful hand lens of magnifying glass; and further assume that at the time that name was placed upon that paper he had no spectacles nor hand glass. Can you form an opinion from your judgment and experience regarding handwritings as to whether he could unaided have begun to write his

name where it begins on that paper, or could have brought the strokes of the letters in such relation to the line upon which the signature appears to be written as there appears without assistance.

Mr. Bovee: Counsel for the defendants object to the question as improper in form and leading, assuming facts not proven, and incompetent. They object to the matter sought to be elicited upon the ground that it is immaterial and irrelevant to the issue sought to be raised by the special pleas,
F. 1465 irrelevant and immaterial to any possible issue in the case, that it is incompetent and calling for the opinion and speculation and conclusion of the witness and not for a fact and hypothetical.

A. The conditions related being true, while it would not be impossible as a matter of accident for the writer to have just exactly placed his pen at that spot, in my opinion with the other circumstances connected with it, it would have been among the impossibilities, his hand must have been put upon that paper at the right place, and the fact of the peculiarity of the initial dot which appears in front of the letter is put down squarely on the paper looks as if two trials had been made, the
F. 1466 pen put down first in the wrong place and then the hand placed correctly, either assisted or the person did it himself if he could see to do it. The ruled line on this instrument is of a pale blue color and not very distinct, so that my opinion would be that the writer must have had some assistance assuming that the points that you have called attention to, in order to get it right and locate it in the proper place.

47 Q. In your opinion was the assistance removed at any time during the making of the entire signature?

Mr. Bovee: Same objections.

A. My opinion would be, sir, judging from my own experience, that the act of writing comes from that we call suggestion, the hand is placed on the paper and becomes for the time being a machine and from force of habit travels until it completes its work unless unexpectedly interrupted. The character of the handwriting illustrated in the so-called Fayerweather leads me to the conclusion that, assuming that to have been a fair specimen of Mr. Fayerweather's ability to write at that juncture,
F. 1467 he could not have written the D. B. which appears in front unassisted, and that the assisting or supporting hand when he had completed the D. B. left him, and the balance is his own work, sir.

48 Q. If the assistance given him were that merely of support without any attempt to exercise any control over his will in the making of the writing, would the result in your opinion tend to better his signature or not?

Mr. Bovee: Counsel for defendants objects as irrelevant and immaterial to the issues presented upon the special pleas, irrelevant and immaterial to any possible issue in the case, incompetent, hypothetical, calling for the opinion and conclusion of the
F. 1468 witness and not for a fact.

A. It would improve what he might be able to do himself unassisted and unsupported. But on the other hand, if his hand was assisted so that in other words another person's hand was on his hand, was on his hand at the time he wrote, the two wills would unconsciously fight against each other and we would find incorporated habits of both writers, and then instead of being an improvement on his own handwriting, the handwriting would deteriorate and it would lessen in quality as to the handwriting of the person who was supposed to be writing it; in other words, two persons who are able to write well, if one

assists the other, the handwriting will disintegrate and lose in quality, while if a person had palsy or was nervous or physically debilitated and found difficulty in writing, if another person came along with steady nerves and muscle and simply supported that hand without any effort to create forms, why that handwriting would improve in quality.

49 Q. State whether or not the signature as a whole possesses characteristics both of the handwriting evinced by the signature Edward Marshall Grout
F. 1469 and the endorsement on that codicil and also the characteristics of the handwriting of D. B. Fayerweather as evinced by his signature to the established testamentary papers, the other four?

Mr. Bovee: Same objection.

A. I do find Mr. Fayerweather present in that signature so far as my knowledge of handwriting goes, but as I have before stated under very extraordinary conditions. I would not be willing to go so far as to say that I find the habits of hand of Edward Marshall Grout illustrated in that signature except so far as I have gone by stating that I do find, and assuming as you did in the hypothetical question that his hand was on Mr. Fayerweather's
F. 1470 why that certain things are there represented would be due to that cause. But for me to select out Mr. Grout as having assisted Mr. Fayerweather to write that signature due to anything that I find of Mr. Grout's other than forms of lines, I would not be prepared to say, sir, or to go as far as that.

50 Q. Well, what forms characteristic of Mr. Grout as appearing in the endorsement of the codicil do you find in the signature, if any?

Mr. Bovee: Counsel for the defendants objects as rrelevant and immaterial to the issues presented upon

the special pleas; irrelevant and immaterial to any possible issue in the case and incompetent.

A. I think I have detailed, sir, in calling specific attention to the second member of the D, and also to the second member of the B; but I could not go into the last portion of it on account of the jumble of the letters that were there present.

51 Q. What significance do you attach to the recurrence of dots? I think you pointed out seven in the signature?

F. 1471 A. Well, those are what we call stops; in other words, hand stops, rested, a part of a second at a time, and made an impression or impress on the paper and then went on. The significance of the dots that are attached to the letters is only in a sense that the hand was tired, there is a good line and there is a very poor line. In respect to the other dots, which are detached and away from it, why they may stand for his habit of punctuating between the D and the B, they might stand for that, but if they do they are in the wrong place.

Mr. Sherman: You may cross-examine.

Mr. Bovee: On behalf of the defendants to this proceeding, excepting the defendants Bulkley and

F. 1472 Vaughan, and the defendant Hamilton College, I shall proceed with the cross-examination of the witness. As to the defendants, Bulkley and Vaughan, the cross-examination of this witness is reserved to Mr. John E. Parsons, as counsel for those defendants. No cross-examination is made in behalf of Hamilton College.

Mr. Sherman: Counsel for the complainants declines to produce Mr. Carvalho for cross-examination except at this time, his deposition having only occupied an hour and a quarter, and inasmuch as no legal excuse is presented for the failure of Mr. John E. Parsons to attend.

Mr. Bovee: In order not to take up too much of the

time of the Court, I give the learned counsel for the complainants the option of producing the witness for cross-examination at some future time when he will be cross-examined by Mr. Parsons in behalf of all the defendants, except Hamilton College, if he prefers that course. If he prefers that course I will not proceed to cross-examine Mr. Carvalho at this time.

Mr. Sherman: Where does the option come in? I fail to get the point of your remark.

Mr. Bovee: That it will save the double cross-
F. 1473 examination of the witness, I presume.

Mr. Sherman: I do not think there will be any double examination. I insist that if you want to cross-examine the witness you must do it now. If you think the cross-examination of the witness can be hung up on account of Mr. Parsons' absence without any excuse, I welcome any plan that you can devise to raise the question.

Mr. Bovee: I understand the statement of counsel to be a declination of the proposition which I make to have the witness cross-examined by Mr. Parsons at some future time by agreement.

Mr. Sherman: I do decline it.

Mr. Bovee: I will then proceed with the cross-examination.

Mr. Stimson: The defendant, Hamilton Col-
F. 1474 lege, while standing on all the objections taken to the testimony of the witness Carvalho, declines to cross-examine said witness on the ground that his testimony is entirely irrelevant and immaterial to any of the issues raised by its plea to the cross bill, and furthermore moves to strike out the whole of said testimony on that ground.

Mr. Bovee: In the behalf of the defendents that I have stated that I protest against being compelled to cross-examine upon matters which are irrelevant to the issues raised by the special pleas, and in cross-

examining the witness defendants do not waive their objection that such matter is irrelevant and immaterial. They make a cross-examination and insist that it is in the nature of a *de bene esse* examination conditioned upon the Court holding that the direct examination of the witness is relevant and material, and before proceeding with cross-examination defendants repeat the tender of the stipulation to strip the case of all irrelevant matter meaning by that matter which is irrelevant to the only issue which they under-
F. 1475 stand to be before the Court, that of estoppel by the judgment in the case of Amherst College and others against Ritch which they have pleaded in bar; and before proceeding with the cross-examination defendants move upon the record to strike out all the testimony of the witness as irrelevant and immaterial to the issue.

Mr. Sherman: Counsel for the complainants inquires whether the stipulation tendered is tendered also by Hamilton College?

Mr. Stimson: Inasmuch as Hamilton College has not placed irrelevant matter upon the record it deems it unnecessary to make such a stipulation.

Mr. Sherman: Counsel for complainants inquires of the counsel for Hamilton College, whether Ham-
F. 1476 ilton College is not taking the benefit of the proofs adduced on behalf of the other defendants herein, and if not he desires that in deciding respecting the tendered stipulation that the counsel for Hamilton College shall disclaim upon the record the use of that evidence.

Mr. Stimson: It is unnecessary to answer that question. It is all provided for in the recent order of Judge Lacombe.

Mr. Sherman; I think you ought at some time or other to cut bait or fish or go ashore.

Mr. Stimson: I certainly will; that order provides the time when I shall do it.

Mr. Sherman: I think good faith requires that you

should decide it now. Counsel for the complainants inquires of counsel tendering the stipulation whether he intends thereby to stipulate that the testimony taken in the record in the Five College action and the briefs of the counsel for the plaintiffs in that action are to be stricken from the record.

Mr. Bovee: Counsel for the defendants does not intend in his proffered stipulation to strip the case of its record, and the briefs in Amherst against Ritch, as they are pertinent to and directly bearing
F. 1477 upon the only issue which they understand to be before the Court, to wit, the bar of the judgment in Amherst against Ritch.

Mr. Sherman: Counsel for t[illegible] complainants states that inasmuch as the introduction of the testimony in the Five College record and the briefs have no legal relation to the question of estoppel by judgment, and inasmuch as the defendants insist on retaining matters which are not pertinent to their plea, while tendering a stipulation to strike such matters from the record, the obvious inconsistency of the tender makes it impossible for counsel for the complainants to accept it or act further upon it. Counsel for the complainants also insists that the legal effects of cross-ex-
F. 1478 amination shall be determined by the rules of law, and not by the reservation stated by the counsel.

Mr. Bovee: Mr. Carvalho, it is now one o'clock. I will proceed with your cross-examination at 2 o'clock, with your permission.

Mr. Sherman: One moment. I suggest that we adjourn to quarter past two in order that we may have the deposition of Mr. Reynolds signed.

At this point a recess was taken until 2.15 P. M.

AFTER RECESS.

Continuation of the examination of *DAVID N. CARVALHO.*

By Mr. Bovee:

F. 1479 52 xQ. Mr. Carvalho, for how many years have you acted as an expert in handwriting?

A. A little over 25, sir.

53 xQ. I understand that you testified in the Fair will contest?

A. Yes, sir, I did, in California.

54 xQ. Which parties to the proceeding retained you in their behalf?

A. The contestants.

55 xQ. The contestants?

A. Yes, sir, the heirs at law.

56 Q. Was the will of Mr. Fair admitted to probate.

A. It was pronounced a forgery, sir.

F. 1480 57 xQ. It was pronounced a forgery?

A. Yes, sir, as I have testified.

58 xQ. Pronounced by whom a forgery?

A. By the Court.

59 Q. And does it stand to-day?

A. I refer to the forged will. There were two wills, one was known as the trust will, that will stands to-day, I think, sir; the other will having been pronounced a forgery, which was the later date will.

60 xQ. Who were the contestants in whose interest you testified?

A. Mrs. Herman Oelrichs, Mrs. Vanderbilt, the present Mrs. William Vanderbilt and Charles Fair, sir.

61 xQ. There is a will of Senator Fair which stands adjudicated as his last will and testament, is there not, at the present time?

A. There is, sir.

62 Q. That is not the will against which you testified?

A. No, sir.

63 Q. And the will against which you testified in that case stands to-day as an adjudged forgery?

A. It does.

64 Q. Is that correct?

F. 1481 A. You are right, sir.

65 Q. There were other experts who testified in that case?

A. There were.

66 Q. Some of whom testified against the theory of a forgery?

A. No, sir; they all testified alike.

67 Q. All alike? A. Yes, sir.

68 Q. Where was the Davis will contest, if it was a will contest?

A. It was, sir, in the city of Butte, Montana.

69 xQ. When did that contest occur?

A. 1891, sir, or 1892, I am not positive.

70 xQ. Did you testify in behalf of the con-

F. 1482 testants or the proponents of the will in that case?

A. The contestants, sir.

71 xQ. Was that will adjudicated a forgery?

A. That will, the jury failed to agree, sir, and the case has never been re-tried.

72 xQ. This was a case before a jury, was it?

A. It was.

73 xQ. Your testimony upon that case was to the effect that the instrument was a forgery?

A. It was.

74 xQ. That the signature of the testator was a forgery?

A. The entire will was a forgery.

75 xQ. The jury in that case did not accept your theory?

A No, under the laws of that State eight out of the jury made a verdict, eight out of the twelve and we only had seven, sir. I was employed by Mr. Robert Ingersoll, Col. Robert Ingersoll, since dead.

76 xQ. I assume, Mr. Carvalho that in that case there were other gentlemen of your profession who entertained a contrary view to you?

F. 1483 A. There were.

77 Q. May I ask who they were?

A. Yes. I think Dr. Ewell of Chicago, he is the only gentleman, who I can recall, who was on the other side. There were, I think, two others, but I do not recall their names, sir. They were gentlemen from the far West that I had never met until that time.

78 Q. Was not the will which was the subject of dispute upon the trial in which you say you testified, subsequently established as the will of Davis?

A. No, sir, not that I know of; because the man that forged the will confessed to it afterwards—Mr. Eddy. The estate though, I understand, has been more or less settled up. They came together and decided

F. 1484 not to have another fight on account of its expense, and there was a sort of give and take, and if it is not all settled it is in process of settlement, sir.

79 Q. Were you present upon the occasion when the alleged forger of that will gave his confession?

A. Yes, he told me that he had forged the will himself, sir.

80 xQ. He did? A. He did, yes, sir.

81 xQ. Was that before or after you had given your testimony in that case?

A. That was after, sir.

82 xQ. How long after?

A. I think——well, I was on the stand about four days or three days and a half, I think it was either the day after I came off the stand or the same night, sir.

83 xQ. Was he a witness in the case?

A. He was.

84 xQ. Had he testified to the contrary under oath?

A. No, sir, he simply said that he found the will in an old bureau draw somewheres down in Iowa.

F. 1485 85 xQ. But did not admit that he had forged the will?

A. No, he was not charged with having forged the will. It is the consensus of opinion though that he did.

86 xQ. Was this statement made by him to you while the jury was still deliberating upon the evidence?

A. Well, the case had not been completed if that is what you mean.

87 xQ. The case had not been completed when he made the admission of having committed the forgery?

A. No, sir.

88 xQ. And notwithstanding that fact the F. 1486 jury failed to agree?

A. Yes, they failed to agree, and I believe sued the proponents, one of the jurors did, that he had been promised a sum of money for sticking to his side and he had not received his money or something of that kind.

89 xQ. And the case was never brought to a re-trial by the proponents?

A. No, sir, it never was.

90 xQ. The Miser Paine case, what was that?

A. That was a case———

91 xQ. Here in New York?

A. Here in New York City tried before our Surrogate, sir. That was also a case———

92 xQ. That is all. In whose behalf did you testify in that case?

A. I think it was for the contestants, sir.

93 xQ. For the contestants? A. Yes, sir.

94 xQ. Who were the contestants in that case?

A. Well, I do not recall their names but the case was decided our way, sir.

95 xQ. And the will defeated?

F. 1487 A. Yes, sir.

96 xQ. And that was sustained throughout the Courts was it?

A. Do you mean it progressed further than that?

97 xQ. Yes, did it go further?

A. I do not think it went further, sir.

98 xQ. It never went beyond the decision of the Surrogate?

A. If it did, I have no knowledge of it, sir.

99 xQ. And the decision of the Surrogate was to the effect that the will was a forgery?

A. Well, I wont be positive about that, sir. I do not recollect exactly whether there had been a change made in the will after it had been signed, or

F. 1488 whether the charge was that the will was itself a forgery; but the will was broken and our side was sustained. I do not recollect exactly. There was some forging done, sir.

100 xQ. Did the Surrogate so adjudicate?

A. He did, sir.

101 xQ. Were there experts who testified contrary to your view in that case?

A. I do not recollect any, sir.

102 xQ. Was the Richardson case a will?

A. The Richardson case, yes; the Richardson case was a will.

103 xQ. Here in New York? A. No, sir.
104 xQ. Where? A. Philadelphia.
105 xQ. And on which side did you testify in that case?
A. For the proponents.
106 xQ. Was that will sustained? A. It was.
107 xQ. Admitted to probate? A. It was.
108 xQ. The issue there was forgery or no forgery?
A. A cold pure forgery, yes, sir.
109 xQ. And that will was finally adjudicated as a forgery, was it, sustained, as such?
F. 1489 A. Well, that was the decision of the Orphans' Court, sir, the Judge of the Orphans' Court.
Mr. Sherman: The will sustained as a forgery?
The Witness: No, I do not mean to say that; I mean to say the will was sustained as possessing a genuine signature; the will was sustained.
Mr. Sherman: Against a charge of forgery?
The Witness: Yes, sir, against the charge of forgery.
110 xQ. Against the charge of forgery?
A. Yes, sir.
111xQ. You testified in that case for the proponents?
A. I so stated, yes, sir.
112 xQ. Was the contrary opinion, expressed by you, expressed by other experts in the case?
F. 1490 A. You mean were their opinions opposite to mine, sir?
113 xQ. Yes. A. They were.
114 xQ. Who testified to that effect?
A. I do not recall the names of the gentlemen, there were two: one came from some town near Allentown, I do not recall the name of it; he was of German extraction, I do not recall his name; there was another gentleman from Pittsburgh, and I do not recall his name at the moment.
115 xQ. Well, you have given us several instances in which your view in respect to forgeries was sustained. There have been instances in which your

view of the case has not been accepted by the Court, have there not?

A. There have, yes, sir.

116 xQ. For instance?

A. Well, I gave testimony in a case called the Backer case.

117 Q. Where was that?

A. That was before our own Surrogate here, Mr. Surrogate Arnold.

118 xQ. A will?

F. 1491 A. A will, yes, sir.

119 xQ. You testified in favor of the theory of a forgery?

A. Yes, sir.

120 xQ. And the will was sustained?

A. The will was sustained.

121 xQ. The Surrogate found you were in error?

A. Well, he found so for reasons.

122 xQ. Well, we wont try that case.

Mr. Sherman: Don't you want to try Surrogate Arnold?

Mr. Bovee: No.

123 xQ. Now, that is one. Tell me another, please?

A. Another will case that I recall was decided

F. 1492 against my view of the matter. I think it was the very first one that I ever testified on as a will case. That was the Callahan case. That is 24 years ago, sir.

124 xQ. Where was that, Mr. Carvalho?

A. Tried here in New York City, sir, before the Surrogate.

125 xQ. And you testified in favor of the forgery theory?

Mr. Sherman: Before Surrogate whom?

The Witness: I do not recall the name of the Surrogate.

A. I do not remember, sir. Anyhow our side was not sustained, whichever it was.

126 xQ. Without going into them in detail, there are other cases in which the judgment of the Court has been that you were mistaken in your testimony, is that so?

A. I presume that is true, sir.

127 xQ. So that as a matter of fact, Mr. Carvalho, as an expert in handwriting you do not claim infallibility in favor of your views.

A. I really do not, sir.

F. 1493 128 xQ. The most that you claim is that from a study of handwriting you have qualified yourself to express an opinion, is that so.

A. That is all the law permits me to do, sir.

130 xQ. And that in your long and extended experience you have found that the views which you have entertained in respect to various signatures from time to time has not been accepted by the Courts in certain instances and juries.

A. In rare cases, sir, that it is true.

131 xQ. It has been your frequent experience, has it not, that the view manifested by you has been antagonized by the opinion and view of experts upon the other side of the case?

F. 1494 A. Very many times.

132 xQ. Indeed, it is the most common occurrence, is it not, that where there is a question in respect to forgery, the view advanced by one expert will be combatted by the opinion of another?

A. I think about 70 per cent of my cases, yes, sir.

133 xQ. You used the expression, Mr. Carvalho, upon your direct examination in speaking of the signature of Mr. Fayerweather to the codicil of November 15, 1890, Mr. Fayerweather was present in the signature. Did I understand you correctly?

A. You did, sir.

134 xQ. Did I understand from that language that you meant to be understood as entertaining the opinion that Mr. Fayerweather had something to do with the making of that signature?

A. That Mr. Fayerweather participated in the making of that signature?

135 xQ. That Mr. Fayerweather participated in the making of that signature?

A. That is right, sir.

136 Q. So that it is not your contention,
F. 1495 or your view in respect to this signature,
Mr. Carvalho, that this signature was a forgery by another person?

A. Not in that sense, no, sir.

137 xQ. Now you said that the signature indicated to your mind, if I understood you aright, indicated to your mind an abnormal condition in respect to Mr. Fayerweather?

A. Yes, sir.

138 Q. Did you mean in respect of his health, his physical condition?

A. Well, in the absence of positive knowledge I meant that some condition due to causes either physical or mental, sir.

F. 1496 139 Q. Illness has an influence upon the signature of a person, has it not?

A. Very much so, sir.

140 xQ. In a greater or less degree conditioned upon the condition of the patient.

A. That is true.

141 xQ. If I understood you aright, you say that you find in the signature of Mr. Fayerweather to the codicil of November 15th characteristics of his hadwriting?

A. Yes, sir.

142 xQ. Those characteristics you find in common in the signature to the will and all of the different

codicils which have been shown you in this case down to the signature to the codicil to the 15th of November, 1890?

A. In a greater or lesser degree.

143 xQ. Would you say that the signature of Daniel B. Fayerweather was a strongly marked and characteristic signature?

A. He writes a very characteristic hand, he does.

144 xQ. Would you characterize it as a nervous handwriting?

F. 1497 A. No, I would characterize it more as a formal handwriting, sir.

145 xQ. Mr. Carvalho, do you know Mr. Reynolds, Mr. John B. Reynolds?

A. The gentleman present in the room, sir.

146 xQ. Yes. A. I do, sir.

147 xQ. Had you any conversation with reference to this matter, about which you have testified before you were sworn in this case?

A. Yes, I had several talks or conversations with him.

148 xQ. Mr. Reynolds has told you, has he, in a general way the features of this somewhat remarkable litigation?

F. 1498 A. I cannot say that, sir.

149 xQ. Has he told or explained to you the circumstances as he understood them, surrounding the execution of this codicil on the 15th day of November?

A. Well, in an indirect way, after I had formulated a judgment independently from an examination of the signature itself, I asked and received from him a copy of the testimony of such subscribing witnesses as had given testimony with a view to seeing how far the testimony comported with the views which I had obtained from the examination of the signature itself,

sir, and in that way I received, some information about the matter.

150 xQ. You mean by that that you examined the signature to the codicil of the 15th of November, 1890, and the signature of Mr. Fayerweather to the will and the other codicils before you had any conversation with Mr. Reynolds whatever?

A. Positively so.

151 xQ. When did you make that examination, Mr. Carvalho?

F. 1499 A. Well, I think, sir, it is a matter of two months ago.

152 xQ. Two months ago? A. Yes.

153 xQ. And that was the first?

66 Q. Were you present when he died?

A. That was the first. It is possible it is a little longer that. I have not my memorandum here with me to ascertain that fact but it is at least two months ago, sir.

154 xQ. Well, did you in this report of the testimony find the testimony of Mr. Edward Marshall Grout?

A. I did, sir, and read it very carefully.

155 xQ. In the contest before the Surrogate?

A. I think the testimony was part of that contest, sir. I am not sure about that.

F. 1500 156 xQ. Did you read any testimony in the record of Amherst College against Ritch?

A. That I cannot say, sir. All I read was Mr. Grout's testimony and Miss Joyce—is that the name?

157 xQ. Miss Joyce, yes? A. Yes, sir.

158 xQ. Mr. Browning's?

A. No, I never saw Mr. Browning's testimony.

159 xQ. You know he was one of the subscribing witnesses to that codicil, as appears by the codicil itself?

A. That says so on the paper itself, sir; but I never saw his testimony.

160 xQ. Was there any reason, Mr. Carvalho, why you should not have examined the testimony of Mr. Browning?

A. No, sir, there was no reason. The testimony of Miss Joyce aud the testimony of Mr. Grout were brought to me together, and I do not think I ever asked for Mr. Browning's testimony, sir. The story of Mr. Browning is told in Mr. Grout's testimony as to what he had to do with it, and I never considered that it was necessary to read his testimony after having read the other
F. 1501 two. I supposed it would be substantially the same.

161 xQ. This is the first occasion upon which you have given testimony in respect to the will of Daniel B. Fayerweather, is it not?

A. I do not recall any other time, sir.

162 xQ. You know that you did not testify on the probate of the will?

A. I did not, sir.

163 xQ. And you know that you did not testify upon the contest upon the trial in Amherst College against Ritch?

A. That is correct, sir.

164 xQ. Do you know Mr. Edward Marshall
F.1502 Grout, Mr. Carvalho?

A. I know very well who he is, sir, and I perhaps have come in contact with him before he became President of the Borough that he is president of.

165 xQ. Who is he?

A. He is a lawyer, sir, and I think he used to be connected with Judge Gaynor's office in Brooklyn.

166 xQ. Was he not a partner of Judge Gaynor at one time?

Mr. Sherman: That is objected to as incompetent and immaterial?

A. Perhaps he was. I think the firm had Mr. Grout's name in it at one time. Yes, I think you are right.

167 xQ. Well, you were going on to say something before?

A. Of course I have read of Mr. Grout in the papers, he is a public man, I think if I remember right he is president of that borough; he is a gentleman, as far as I know anything about him, who stands very well in the community, sir.

F. 1503 168 xQ. Have you ever met him personally?

A. If I have I do not recall it, and yet I am almost sure I have come in contact with him in some way.

169x Q. You have never testified in any action in which he was counsel?

Mr. Sherman: Wait a minute. I ask to have the testimony read.

(The last five questions and the answers thereto were repeated by the stenographer.)

Mr. Sherman: I move to strike out the answer in reference to Mr. Grout. I object to the
F. 1504 answer as incompetent, not responsive and immaterial and move to strike it out.

(Question 169 repeated by stenographer.)

A. Well, I have been employed by Judge Gaynor, sir, before he became Judge, and if Mr. Grout was connected with the office at that time I may have come into contact with him and he may have been of counsel, but I do not recall it at all, ever having come into personal contact with him.

170 xQ. What was that case?

A. It was a divorce case, sir, tried in Brooklyn.

I cannot give you the name now, sir, it is some years ago. I was employed by Judge Gaynor in that case.

171 xQ. A divorce case?

A. A divorce case, yes, sir.

172 xQ. There was a forgery, was there?

A. There was a charge made in that case that our client went to a hotel and registered his name with somebody who was not his wife, and a part of the contest was as to the identity of that signature, whether it was written by him, and I gave testimony that

F. 1505 it was not in his handwriting and the case was decided our way.

173 xQ. Did you testify in the Molineux case?

A. I did not, sir. I testified in the May Grand Jury proceedings where Mr. Molineux was discharged by that Grand Jury but in no regular Court proceeding I testified in the Molineux case, sir.

174 xQ. You were an expert in that case, were you not?

A. I testified as an expert in the Grand Jury proceedings, yes sir.

175 xQ. You were subsequently as an expert employed by the defense upon the trial, were you not, and did not go upon the stand?

A. The defense put in no testimony. I should

F. 1506 have gone upon the stand, sir, if they had put in any testimony.

176 xQ. You were there throughout the trial assisting Mr. Weeks as counsel in that case?

A. Every day, sir.

177 xQ. You did entertain a view contrary to the opinion expressed by the experts for the people in that case, did you not?

Mr. Sherman: Objected to as immaterial.

A. I testified before the Grand Jury after they had investigated the matter for two weeks and had weighed the testimony of nine other experts, the State experts. I was employed by the Grand Jury themselves and gave

testimony directly opposite to what they had testified to, and the Grand Jury evidently took my view of the matter because they dismissed the case.

177 xQ. But upon the subsequent trial of the case the Jury took a contrary view of it, did they not?

A. When there was no defense put in, sir, that is to say a petit jury.

178 xQ. Do you know who J. Prentiss Browning was, the other subscribing witness to this paper?

A. No.

F. 1507 179 xQ. Do you know who Elizabeth Joyce was?

A. From her own testimony only, sir.

180 xQ. And from reading that testimony learned that she was in Mr. Fayerweather's family at that time, did you not?

A. I did sir.

181 xQ. And a relative of the wife of the complainant, John B. Reynolds?

A. I so understood, that she had acted as a sort of amanuensis to Mr. Fayerweather, attending to matters at home for him in that respect.

182 xQ. Have you talked with anyone else about the circumstances and the testimony in connection

F. 1508 with the execution of this codicil of the 15th of November, besides Mr. Reynolds that you have spoken of?

A. Yes, Sir.

183 xQ. Who? A. A Counsel.

184 xQ. Mr. Sherman? A. Yes, sir.

185 xQ. And Mr. Blaikie?

A. Mr. Blaikie was present.

186 xQ. And from them have you learned some of the circumstances from their point of view connected with the execution of this paper?

A. There was a desultory conversation going on there before I came into it which I listened to, sir, and

I think I know pretty much what their views are in the matter in respect to the execution of this instrument. I think that they have taken the view that I have upon the matter, sir, at least they told me so.

187 xQ. Do I understand you correctly that in your view of this case this was what you would call an assisted signature?

A. Well, I have not gone as for as to use the word assisted, sir, I used the word supported or assisted, I qualified my statement, sir.

F. 1509 188 xQ. Do you mean by that that the testator in attempting to make his signature in your opinion required some physical assistance or support for his hand?

A. I do not think there is any question about it, sir, so far as my opinion goes. I think the matter is obvious.

189 xQ. Has it not been your observation, Mr. Carvalho, that many people at times have been unable to subscribe their names and only able to indicate their mark by a cross?

A. That is not frequent.

190 xQ. And such an act is perfectly consistent with the theory of understanding on the part of the

F. 1510 person so subscribing his name and his ability to understand?

Mr. Sherman: Objected to as not being a matter of opinion, based upon expertness in handwriting; but a question of medical experience or science for which no foundation has yet been laid.

A. I think that is medico-legal, sir.

191 xQ. And you do not care to express an opinion upon any such matter?

A. I have witnessed myself, sir, persons who have made their mark when I was many years ago a notary public. It was not infrequent at all, and when they

made their mark, they made it it knowing that that was all they could do.

192 xQ. And you regarded that as a perfectly legal valid act, did you not?

A. I did, sir. I said so and so her mark or his mark and filled it in. But for a person who was able to write, had the ability to write, who substituted a mark for the reason of inability, I have no experience on that subject, sir; I do not recall anything of the kind.

F. 1511 193 xQ. I understand you to say that in your opinion the signature of the subscribing witness, Edward Marshall Grout was written with a different pen from that of Miss Joyce and Mr. Browning?

A. I so stated.

194 xQ. What kind of a pen do you think Mr. Grout used?

A. I think he used a very flexible pen made of a material much more flexible than the steel pens are made of, and a fair surmise would be that he used a gold pen.

195 xQ. A gold pen? A. Yes, sir.

196 xQ. Those are the pens commonly in use in stylographic pens, are they not?

F. 1512 A. No, a stylographic pen has an opening with a center pin to it, a pin point, a needle point, and the ink flows by capillary attraction, as you touch the paper the needle point goes up and down the tube. The common pen, and what you are referring to probably, is what they call the fountain pen.

197 xQ. A fountain pen?

A. Yes, sir; that is fed from a well in the handle.

198 xQ. Those fountain pens have gold pens?

A. Yes, sir; they must have because the corrosion would be so great, the chemicals would destroy them if they were steel pens.

199 xQ. And is it your opinion that Mr. Grout may have used one of these fountain pens in the writing of his signature?

A. I think he did use such a pen.

200 xQ. That is your opinion?

A. Yes, sir.

201 xQ. And that the signature of Miss Joyce and Mr. Browning were written with ordinary steel pen?

A. Ordinary steel pens, yes, sir.

202 xQ. Did I understand you to say that in
F. 1513 your opinion that they were written in the same ink?

A. As Mr. Grout's?

203 xQ. No, was Browning's written in the same ink as Miss Joyce's?

A. Yes, sir.

204 xQ. And possibly the same pen?

A. It is the same quality of pen.

205 xQ. The same quality of pen?

A. Yes, sir.

206 xQ. And the endorsement on the back of the codicil of November 15, 1890, is it your opinion that that was written by the same kind of
F. 1514 a pen as the signature of Mr. Grout?

A. Well, a part of it, yes, sir.

207 xQ. Part of it? A. Yes, sir.

208 xQ. Do you find any words after the signature Elizabeth R. Joyce in any different handwriting from her's?

A. Yes, sir.

209 xQ. What are they?

A. The words "residing at."

210 xQ. Do you find any of the words after the signature of Edward Marshall Grout in any other handwriting?

A. I do, sir.

214 xQ. What? A. The words residing at.

215 xQ. And are the words "residing at" occurring in three lines all in the same handwriting?

A. They are.

Mr. Sherman: I will give you an admission as to whose handwriting they are in if it will facilitate you.

216 xQ. And in your opinion is the handwriting of the words "residing at" the same as that of the preceding part of the subscribing clause.

A. It is in the same handwriting as to be
F. 1515 found in the body of the instrument.

Mr. Bovee: I can tell you whose it is.

Mr. Sherman: Do you want an admission of the handwriting of Stewart L. Woodford?

217 xQ. In your opinion is the word 15th in the second line above the signature of D. B. Fayerweather and above the seal in the same handwriting as that of Edward Marshall Grout?

A. It is.

218 xQ. Written with the same pen?

A. It was.

219 xQ. And the same ink?

A. And the same ink.

220 xQ. In your opinion was the signature
F. 1516 D. B. Fayerweather written with the same pen as that which wrote the signature of Edward Marshall Grout?

A. It was not.

221 xQ. Was it the same as that which was used in writing the signature of Miss Joyce and Mr. Browning?

A. It might have been. It is a pen of that character and kind.

222 xQ. And the ink the same?

A. And the ink apparently the same, yes, sir.

223 xQ. Of course, Mr. Carvalho, of your own knowledge you know nothing about the condition of Mr. Fayerweather at that time?

A. Absolutely nothing, sir.

224 xQ. Either his physical or mental condition?

A. Neither one nor the other, sir.

225 xQ. Mr. Carvalho, have you that confidence in your judgment and ability to testify as to what was done by Mr. Fayerweather in respect to that signature to the codicil of November 15th, that you would still adhere to the testimony that you have given in this case, if you heard Mr. Grout and Mr. Browning both swear that the signature was made by Mr.

F. 1517 Fayerweather without any assistance whatever from any person on that occasion?

Mr. Sherman: One moment, please. Objected to on the ground that there is no evidence whatever in the case nor in any preceding contest in the case, neither the Five Colleges action nor the Surrogate's record, given by J. Prentiss Browning in support of the hypothesis presented by the question, and on the further ground that there is no evidence in this cause given by Mr. Grout upon the subject and the hypothesis therefore does not proceed upon any foundation; and upon the further ground that it affirmatively appears that such testimony as was given by Mr. Grout upon the subject in the Surrogate's Court is shown by the dis-

F. 1518 position of William Henry Arnoux the counsel for the proponents of the will to have been given after an elaborate drilling of the witness, Mr. Arnoux testifying that his appearance and consistency upon the stand was the result in substance of his being so drilled.

I would not wish, sir, to characterize Mr. Grout or to criticize such a statement if he would be now willing to make it. I form my opinions from what is before me. If Mr. Grout should come forward and say positively that Mr. Fayerweather wrote that signature unassisted, I would be compelled, judging from my experience and my knowledge of such things, to

believe Mr. Grout was mistaken, that his recollection was at fault if he said that. There are things in there that are inconsistent, and a matter to be real should be consistent, things that do not fit. Now I know, at least I feel, although I was not present to see that signature written, that Mr. Fayerweather labored very hard when he wrote the last part of it, the little stops to which I called attention were rests, and he struggled hard to make the marks that are present, but he was incapable, and the result is what we have
F. 1519 before us in the shape of a jumble. Now in respect to the two first letters, those are legible, even if they ain't made as well as he was in the habit of making his D Bs, they are legible, and they are so legible as to make them inconsistent with the illegibility of what follows. Consequently, I think Mr. Grout might be absolutely mistaken.

226 xQ. But your view of the case is based on theory solely?

A. More than theory, because we have matters before us. If Mr. Grout should come forward to say that he saw that signature written on a slate I would not believe him because it is written on a piece of paper.

F. 1520 227 xQ. But you were not present?

A. That is all true.

228 xQ. And you did not see the signature?

A. We have the actual thing before us.

229 xQ. But you were not present?

A. That is true, sir.

230 xQ. You did not see what transpired there?

A. That is true.

231 xQ. And any view that you express upon the subject is upon theory, is it not?

A. It is an opinion, but if it was a mere matter of handwriting as a discussion in regard to a signature,

that is solely a line, an ordinary thing you might say, that is a matter of opinion, and there could be a difference of opinion, but here we have something that is tangible and definite and no person except he looks at it through eyes that do not want to see, but what would have to say that that signature is not the real signature of D. B. Fayerweather as illustrated in the admitted handwriting.

232 xQ. And is it your opinion that your judgment and opinion of this case and the signature

F. 1521 of Mr. Fayerweather, you not having been present and necessarily your views being a matter of opinion and speculation and theory, would be entitled to equal consideration with another witness of equal credibility and character who was present and actually put upon the paper?

A. I think the Court would take the opinion, sir, of the person who saw the thing done as against the opinion of an expert witness, except the expert was able to show him obvious and definite things showing that the eye of the person who saw it done must be mistaken, and then he would believe the expert.

F. 1522 Signed,

DAVID N. CARVALHO.

Sworn to before me this 21st day of February, 1901.

JOHN A. SHIELDS,

Examiner.

Mr. Bovee: It does not occur to me that there is anything further that I desire to ask Mr. Carvalho.

His further cross-examination will be reserved by the other defendants as I have indicated.

Mr. Sherman: Counsel for the complainants, having produced the witness and having tendered him for cross-examination, after a short examination in chief, and the witness having been cross-examined by the associate counsel of Mr. Parsons, and the absence of the other counsel for whose benefit further cross-examination is sought to be reserved not being accounted for by any legal excuse, the complainants con-
F. 1523 tend that they have fulfilled the measure of duty on them as to the production of the witness for cross-examination and that his deposition shall now be closed subject to the right if they desire it of absent counsel to recall him on their own account for further cross-examination.

Mr. Bovee: No, we ask that Mr. Carvalho appear to-morrow morning for the purpose of concluding his cross-examination.

Mr. Sherman: I shall be permitted, I suppose, to have the say about that. I have nothing to add to what I have already said upon the subject.

Mr. Bovee: Well, I do not know whether you will or not. I will ask Mr. Shields to come in here.

F. 1524 Mr. Sherman: Mr. Examiner, this is the situation. We have called Mr. Carvalho as a witness for the complainants; he was examined very briefly and he has been cross examined certainly at as great length by Mr. Bovee. Now Mr. Bovee wants us to produce him to-morrow morning or at some other time for further cross-examination by Mr. Parsons. Now, I understand the rule to be this, the party calling the witness must afford the opportunity for reasonable cross-examination, and I do not think that there is any rule which will enable counsel for one of the parties to remain away from the examination without any legal ground

and at his convenience consider whether he wants to cross-examine further, and which requires the party producing the witness shall thereafter produce him to suit the convenience of other counsel. I think the rule is that under this condition of the record and after this cross-examination that if Mr. Parsons desires to further cross-examine Mr. Carvalho, it is his duty to produce him for that purpose. I do not think the expense or the burden is to be placed upon the complainants. Now that is the situation,
F. 1525 because Mr. Parsons is not here and he is not in Court anywheres. Of course we all know that expert witnesses are paid as they ought to be and that a day is a day. Now I think it would be extremely burdensome to us to carry our regard for Mr. Parsons' convenience to the extent that would require us to be put to the expense of another day's attendance of this expert witness. I think if Mr. Parsons wants to cross-examine him further the expense should be on him.

Mr. Bovee: Mr. Examiner, the responsibility for the situation and the embarassment of the counsel for the complainants cannot be attributed to me. You know that I came here upon an understanding that
F. 1526 a different course of procedure was to have been followed.

Mr. Sherman: There was no foundation for any such understanding.

Mr. Bovee: I think the Examiner knows there was a foundation for that understanding. You cannot tell anything about it from day to day to tell what is going to be done. Now I have done the best I could, I have cross-examined as far as the clients whom I represent are concerned and I am through. Mr. Parsons as you know represents two of the executors and certain institutions and you know that he has been in this litigation from its beginning and I told

you this morning that I should insist upon having a reservation made that he might examine. the witness. Furtheromre I tendered to the other side an agreement that I would not cross-examine, and so that the time might not be duplicated the whole cross-examination of Mr. Carvalho might be postponed and adjourned until to-morrow morning when Mr. Parsons would be here and I would accept his cross-examination. I was certainly seeking to save time in the case when I made that proposition. It was not accepted by
F. 1527 the other side and I have examined him since two o'clock this afternoon or quarter past two. If Mr. Parsons had made any stipulation or agreement and it was the understanding that we should proceed with these witnesses, live witnesses upon the stand to-day, it would be a very different question, but we came here supposing that we were going to read the depositions from the Hamilton College record and cross-examine witnesses in that case. I was prepared to do that and am prepared to do it now.

The Examiner: Well of course it is a hardship on the part of the complainants to get experts to come here because they have got to pay them more than the ordinary dollar and a half a day.

F. 1528 Mr. Bovee: Then he should not break the regular order of the case and thrust them in.

Mr. Sherman: The underlying fallacy of this whole thing is that Mr. Parsons is to come here when he pleases and we are to wait until he gets ready, and that if he don't happen to be here we have got to wait until he comes. Now, the fact that Mr. Parsons has been in this litigation so long is a reason why he should stay here not why he should stay away. As to this matter about depositions or records it simply comes to this, that we had begun Prescott Hall Butler's deposition and I have withdrawn that to get the deposition out of the way and there is no valid reason in the world why

they should not be ready to do their duty in the case. I want to announce right here that this endeavor to point out ahead what we are going to do, leading to such unjustifiable perversions of it, I propose to let my adversaries find out in the future what I am going to do.

Mr. Bovee: Mr. Examiner, I do not apprehend that counsel for the complainants will pursue any other course than he has pursued in the past and in following that course he has sought to em-
F. 1529 barrass counsel for the defendants in every way in his power. To illustrate he would read the testimony of a witness from the record in the Hamilton College plea. If he said the night before I will read the testimony of so and so and so and so from the Hamilton College record, the next morning when I came here prepared to cross-examine those witnesses indicated by him I would find a witness put upon the stand and orally examined. I have memoranda which I prepared upon the assurance of counsel that so and so's testimony would be taken a week or ten days ago, I think when I had prepared the night before for the cross-examination of that witness. Now you can see Mr. Examiner, it is one thing to have a witness upon the stand and
F. 1530 listen to his oral testimony, you get certain impressions from that and are ready to cross-examine him at the conclusion of his direct examination, but where you are given a book and have to read from the testimony and the next morning be prepared to cross-examine, you have got to be familiar with what the witness has testified on other occasions and be ready the next morning, and if it is postponed for a week or ten days it goes out of your mind.

The Examiner: Maybe Mr. Parsons won't have to cross-examine Mr. Carvalho any more.

Mr. Sherman: If he does let him produce him. There is no doubt that all his expenses are being

charged to the estate and they have plenty to pay that. It is only a question who shall pay Mr. Carvalho for the next time. I think we have established the right to have them pay him.

Mr. Bovee: We do not propose to pay witnesses for the complainants in this case, and we ought not to be compelled to or expected to. Mr. Carvalho is an expert witness called here to testify in respect of a signature of Daniel B. Fayerweather to his last codicil.

F. 1531 There are three signatures on that paper of three subscribing witnesses, one Miss Joyce, a relative of the wife of the complainant, John B. Reynolds, a lady taken out of the family of Mrs. Fayerweather, found in the family of Mrs. Fayerweather that day, another Mr. Edward Marshall Grout and another Mr. Browning. They are all witnesses available to the other side in this case to testify to the fact. Now, notwithstanding that fact, these complainants, have called Mr. Carvalho, an expert on handwriting. My own judgment is—however great a degree of respect I may have for Mr. Carvalho as an expert—that his testimony in this case is not worth the paper it is written on.

F. 1532 The Examiner: Then what is the use of examining him?

Mr. Bovee: That is another proposition. There may be other matters that we may wish to inquire about and I have concluded my cross-examination but Mr. Parsons may have an entirely different view of it. Now all we ask is that Mr. Carvalho be here to-morrow morning.

The Examiner: I will fix Mr. Carvalho's examination for to-morrow morning at half past ten and leave the question of who is to pay the witness's fees to the Court.

Mr. Sherman: Wait a minute. That may not be satisfactory to Mr. Carvalho.

Mr. Carvalho: Then I will have to wait until all the appeals are decided.

The Examiner: In a good many respects Mr. Sherman's proposition is correct. He may bring witnesses here from all over creation; he cannot keep witnesses here in New York on account of some counsel's engagement.

Mr. Sherman. I ask you to certify this question now to the Court.

F. 1533 Mr. Bovee: In this case, Mr. Examiner they were given notice and they knew precisely this proposition would be made. They knew I could not conclude the cross-examination of Mr. Carvalho when he was put upon the stand and they knew it on Saturday.

Mr. Sherman: I suggest that this arrangement be made, that———

The Examiner: I will certify that proposition to the Court.

Mr. Sherman: It is an idle thing to do unless we can be heard. You understand that what he is paid for coming to-day will not pay him for coming to-

F. 1534 morrow. I suggest this mode of disposing of it, I submit that instead of directing him to attend to-morrow morning that the propriety of the direction be certified to the Court and then the Court, if it sees fit to direct him to attend again, fix the time when he shall attend.

The Examiner: Well, I will do that.

Mr. Sherman: Then, Mr. Carvalho, that will be all for to-day. In the meantime, I submit that we are entitled to have Mr. Carvalho sign his deposition as far as it has gone when it is written out.

Mr. Bovee: I do not suppose he can sign his deposition until it is written out.

The Examiner: Of course it will have to be written out before he can sign it.

Mr. Sherman: Dr. Vedder has been sworn, I believe. I read in evidence of this witness in the record taken upon the pleas of Hamilton College.

F. 1535

MAUS R. VEDDER, being called as a witness on behalf of the complainants, being duly sworn, testified as follows:

Direct examination by Mr. Sherman:

1 Q. Dr. Vedder, you have been a physician for how many years?

A. I graduated at the College of Physicians and Surgeons in 1861.

2 Q. And you have practiced in this city ever F. 1536 since?

A. No, sir; for about twenty years. The rest in Long Island.

3 Q. And you are now in active practice here?

A. I am.

4 Q. Where is your residence and office?

A. 708 Madison avenue, New York City.

5 Q. Did you know the late Daniel B. Fayerweather?

A. I did, sir.

6 Q. How long?

A. Well, for fifteen years, I think; that is my impression now.

7 Q. Were you his attending physician at the time of his death, and prior thereto?

A. I was.

8 Q. For how long prior?

A. Well, nearly that length of time.

9 Q. Were you intimately acquainted with him?

A. Yes, sir; I was his friend and physician.

10 Q. Of what disease did Mr. Fayerweather die?

A. He died of consumption.

11 Q. And how long was he afflicted with that F. 1537 disease before his death?

Mr. Bishop: That question is objected to as incompetent, irrelevant and immaterial, and upon the ground that the evidence called for by this question and by other questions, is not relevant under the plea and replication, neither competent nor relevant.

A. My impression is about five years.

12 Q. Did he cease to attend actively to business for some time before his death?

Mr. Bishop: That is objected to as incompetent, irrelevant and immaterial, and upon the ground that the evidence called for is neither competent nor relevant and under the plea and replication.

A. Not a great while, no, sir.

F. 1538 13 Q. How long?

A. I am under the impression it might be a year or two—eighteen months, or somewhere near there.

14 Q. Was he a member of some firm?

A. Yes, sir.

15 Q. What was the firm?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and upon the ground that the evidence called for is neither competent nor relevant under the plea and replication.

A. I believe it was Fayerweather & Ladew.

16 Q. Their business was what?

A. Leather.

17 Q. Were you present in his house on or about the 11th day of November, 1890, when a paper was signed by him in the presence of Mr. Prescott Hall Butler, yourself and others?

Mr. Bishop: I object to the question as imcompetent, irrelevant and immaterial, and upon the ground that the evidence called for is neither competent nor relevant under the plea and replication.

F. 1539 A. Yes, sir.

18 Q. Was that the date, November 11th?

A. November 11th, 1890.

19 Q. How long was that before his death?

A. I think he died on the 15th.

20 Q. Of November?

A. Yes, of the same month.

21 Q. At what time of day was it that he signed this paper?

A. It was somewhere about noon.

22 Q. Were you in the house by appointment?

A. Yes, sir, the second visit, I was there twice, by appointment.

23 Q. On the occasion when he signed this

F. 1540 paper you were there by appointment?

A. Yes, sir.

24 Q. To witness the paper?

A. Yes, sir.

25 Q. And who else was present at the time in the room?

A. Miss Elizabeth Joyce and Dr. Wilcox.

26 Q. Who was Miss Elizabeth Joyce, Mrs. Fayerweather's sister?

A. No, a relative, a niece, I think it was.

27 Q. And how did you hear her spoken of while you were there?

Mr. Bishop: I object to the question as incompetent,

irrelevant and immaterial, upon the ground that the evidence called for is neither competent or relevant under the plea and replication.

28 Q. What was the mode of addressing her, "Lizzie"?

A. Who, the family?

29 Q. The niece.

A. The family spoke of her as "Lizzie"?

30 Q. Yes. A. I do not recollect that.

31 Q. Were you present in the room when Mr. Butler arrived?

F. 1541 Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and upon the ground that the evidence called for is neither competent nor relevant under the plea and replication.

A. Mr. Butler was there, I think, first, I came in.

32 Q. Whom did you find there when you came in?

A. Mr. Butler and Mrs. Fayerweather and Miss Joyce, who is now Mrs. Reynolds; I do not recollect anyone else.

33 Q. Where was Mr. Fayerweather when he signed the paper?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and upon the ground that the evidence called for is neither com-

F. 1542 petent nor relevant under the plea and replication.

A. Upon the second story front.

34 Q. In what part of the room?

A. Well, it was near the—as I recollect the position—it was near the centre of the room, a little to the east.

35 Q. Of the middle line? A. Yes.

36 Q. Was he sitting in a chair?

A. In a wheel chair; I think they brought him in on a wheel chair.

37 Q. Was there a table nearby?

A. Yes, sir; there was his library table.

38 Q. About five feet by three and a half, or such a matter?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and upon the ground that the evidence called for is neither competent nor relevant under the plea and replication.

A. Yes, about that size.

39 Q. What was Mr. Butler doing when you arrived?

Mr. Bishop: I object to the question as incom-
F. 1543 petent, irrelevant and immaterial, and upon the ground that the evidence called for is neither competent nor relevant under the plea and replication.

A. I do not recollect.

40 Q. Was he reading a paper to Mr. Fayerweather?

A. No, he had not begun the paper yet.

41 Q. When did you first see the paper? Who produced it, Mr. Butler?

A. I recollect Mr. Butler standing and Mr. Fayerweather sitting down and Mr. Butler reading the paper, and I asked Mr.—knowing Mr. Fayerweather very well, I thought perhaps he did not care to have us lis-
F. 1544 ten to the paper, and I then suggested to him if it was necessary for us, for Dr. Wilcox and myself—Miss Joyce was not present—whether we should listen to the paper. Mr. Butler said it was not necessary, and I thought perhaps it would please Mr. Fayerweather and I went to the window with Dr. Wilcox, the 57th street window while the paper was being read; I heard a portion of it, however.

Mr. Bishop: I move to strike out the answer of the witness upon the ground that the testimony is incompetent and immaterial under the issues raised by the pleadings in the case.

Mr. Sherman: Will you accept a stipulation that the answers may be taken subject to the same objection, or do you want to repeat it in each instance?

Mr. Bishop: I do not care to repeat it, but I want to have it full upon the record.

It is stipulated that the stenographer, in writing out the minutes of the testimony of this witness, shall note an objection on the part of the defendant, the Trustees of Hamilton College, to each and every question,
F. 1545 upon the ground of incompetency, irrelevancy and immateriality of the matter called for by the question, as not pertinent under the issues raised by the plea and replication.

42 Q. Did Mr. Fayerweather say or do anything to indicate that he was unwilling that you should hear what Mr. Butler was doing or saying or reading?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. No, sir.

F. 1546 43 Q. How long a paper was this, was it one page or more?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. Well, I think it might have been not less than three and probably four.

44 Q. Legal cap pages?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. Yes, sir.

45 Q. Did Mr. Butler read it to Mr. Fayerweather in such a tone of voice that you could by paying attention have heard it?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea under replication.

A. I could have heard it; yes, sir.

46 Q. And when you paid attention did you
F. 1547 hear it?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. I heard him read it, or read a portion of it and then I interrupted him and asked him whether it was necessary to listen.

47 Q. Do you remember what portion you heard him read? If you remember, state what it was.

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

F. 1548 A. No, sir, I do not recollect.

48 Q. After the reading of it, did Mr. Fayerweather say anything in regard to his understanding of it?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. Yes, sir.

49 Q. What did Mr. Fayerweather say?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it

calls for no evidence competent or material to the issues raised by the plea and replication.

A. After Mr. Butler had completed the reading of the paper, I came from the window and walked in his direction and he looked towards me and said "Now, as I understand it, after everybody is paid," and then Mr. Butler———

50 Q. He looked at first one and then the other?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason
F. 1549 that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. Yes, sir. "After everybody is paid, and everybody is satisfied, the remaining portion is to be divided up among the different colleges, each to receive their share."

51 Q. And did Mr. Butler assent to that?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. Yes. That was as I understood the short part of a codicil or of a paper.

F. 1550 Mr. Bishop: I ask to have so much of the witness's answer stricken out as gives his understanding.

Mr. Sherman: I consent that it be stricken out, what he understood.

52 Q. Was Mr. Fayerweather on that occasion in your opinion of sound and disposing mind?

Mr. Bishop: I object to the question on the ground that it is incompetent, irrelevant and immaterial and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication, and upon the further ground that it calls for an opinion of the witness and not for facts and circumstances.

A. I think he was competent.

53 Q. Was he rational or irrational?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. Rational.

54 Q. Did he appear to understand the purport and substance and meaning of this paper, and what he was

Mr. Bishop: I object to the question as in-

F. 1551 competent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. He appeared to.

55 Q. And was his physical condition at that time such that in your opinion as a physician his mind was competent to act understandingly and to give full force to his desires?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. His physical and mental condition?

F. 1552 56 Q. Yes.

Mr. Bishop: Furthermore, I object to the question as to its form.

A. Yes.

57. Did Mr. Butler say anything to you and to the others about becoming witnesses?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. No, sir.

58 Q. Well, did he give any expression of Mr. Fayerweather's wish that you should sign as witnesses?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. Mr. Fayerweather requested us to sign as witnesses.

59 Q. And you did so?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the is-

F. 1553 sues raised by the plea and replication.

A. I did.

60 Q. And what became of the paper?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. I do not know.

61 Q. When did you last see it?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. At that time, on the 11th.

F. 1554 62 Q. When you went away did you leave Mr. Butler there, or did he go before you went?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. I think Mr. Butler went first.

63 Q. And left the paper behind?

Mr. Bishop; I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. I do not know.

64 Q. Was the paper signed by each of the witnesses in Mr. Fayerweather's presence and in the presence of each of the others?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. Yes, sir.

F. 1555 65 Q. About what time on the 15th of November did Mr. Fayerweather die, in the evening? About what hour did he die?

Mr. Bishop: I object to the question as incompetent, irrelevent and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. In the neighborhood of nine or ten o'clock in the evening.

66 Q. Were you present when he died?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. I was by his bedside.

F. 1556 67 Q. Down to what period prior to his death was he able to understand what was said to him and make intelligible answers to it?

Mr. Bishop: I object to it as not calling for facts and circumstances, but calling for the opinion of the witness on facts and circumstances which have not been testified to.

A. I saw him in the morning of the 15th after my office hours, as I recollect.

68 Q. That would be about when?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. Eleven o'clock. I do not think he was competent at that time.

69 Q. Well, was he able to understand what was said to him and make intelligible answers to it?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. Yes, sir; he could answer.

70 Q. Well, down to what time was he able
F. 1557 to understand what was said to him and make intelligible answers, so far as you know?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication, and upon the further ground that it does not appear that the witness was there.

Mr. Sherman: Well, he can speak only of the time that he was there.

A. Well, I do not know.

71 Q. How long did you remain there on this occasion when you arrived at eleven o'clock in the morning of the 15th of November?

F. 1558 Mr. Bishop: I object to the question of incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. I made my usual call in the morning, the usual professional call in the morning and then I think I was in the house———

72 Q. Well, it would be better to state about how long you remember that as being and we can get at it better.

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it

calls for no evidence competent or material to the issues raised by the plea and replication.

A. I might have remained an hour.

73 Q. You think you were there until twelve o'clock on the 15th?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. The time that we signed the paper, I think
F. 1559 I was there about an hour.

74 Q. No, that was the 11th; I am talking now about the day of his death. You say you got there at eleven, and now I ask you how long you remained.

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. Just the usual call, probably twenty minutes.

75 Q. And when did you go again, that day.

Mr. Bishop: I object to the question as incompetent, irrevalent and immaterial, and for the reason
F. 1560 that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. On the appointment at twelve o'clock, or about that time.

76 Q. And how long were you there on that occasion?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues by the plea and replication.

A. Well, probably an hour.

77 Q. And when did you go again? I think you are confusing the 11th with the 15th?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues by the plea and replication.

A. That is true, I am.

78 Q. Will you kindly confine your attention now to the day of his death, the 15th of November, Saturday. Now, please state when you first arrived there on the morning of the day of his death, and how long you stayed?

F. 1561

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. Yes, now I understand; that ought to be stricken out, for the reason that I had the two confused. Well, I was there—I went immediately after my office hours—in the neighborhood of eleven o'clock, and I might have remained there half or three-quarters of an hour.

79 Q. And when did you go again on that day?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

F. 1562

A. I do not think I came again until in the evening, about ten o'clock. I came then, but I did not come by appointment. I had been asleep and I woke up and concluded I would like to see him once more, and I went back and stayed there until the time of his death, which was about ten or eleven o'clock, or somewhere about there.

80 Q. Had an appointment been made with you to

go there on that afternoon which was recalled or which you did not keep?

Mr. Bishop: Objected to on the ground that it is leading.

A. I do not recollect.

81 Q. Had anything been arranged with reference to your being a witness for some other paper that day?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it call for no evidence competent or ma-

F. 1563 terial to the issues raised by the plea and replication.

A. Yes, sir.

82 Q. Well, what arrangement was that and who made it?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that the question calls for no evidence competent or material to the issues raised by the plea and replication.

A. I think Mr. Vaughan and Mr. Fayerweather, no, Mr. Fayerweather arranged it, that I should come in the neighborhood of five o'clock to witness another paper.

83 Q. And were you to bring anyone with you

F. 1564 as a witness?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. Yes, Dr. Wilcox.

84 Q. And before that time arrived, did you receive any message on the subject of your coming?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. Yes, sir; that it was not necessary.

85 Q. Who brought the message?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. I do not know. I got the message from my servant.

86 Q. It was left at your door by somebody whom you did not see, is that what you mean?

Mr. Bishop: I object to the question as in-
F. 1565 competent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. I was not in when the message came; it may have been from Dr. Wilcox; I am not sure about that; but I did not get it directly from the messenger.

87 Q. Was Mr. Vaughan in the house on the 11th at the time of the execution of the paper which you witnessed?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material
F. 1566 to the issues raised by the plea and replication.

A. No, sir; I do not think he was there.

88 Q. Was he there at any time on the 15th, the dying day?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. Yes, sir.

89 Q. When did you first see him there on that day?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it

calls for no evidence competent or material to the issues raised by the plea and replication.

A. At the time I made him the visit in the morning?

90 Q. Did you have any conversation with him at that time, and if so what passed between you?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

F. 1567 A. I came into the room, and when I came in, I found Miss Joyce and Vaughan there.

91 Q. You mean the Miss Joyce that is now Mrs. Reynolds?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. Yes, sir.

92 Q. Now, will you state what was said by you to Mr. Vaughan or by Mr. Vaughan at that time, and all of it?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the
F. 1568 reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. I inquired of Miss Joyce Mr. Fayerweather's condition, and asked the usual questions as to how he passed the night and so on, and I afterwards went into the room to examine Mr. Fayerweather, and after doing so I returned to the front room and found Miss Joyce and Mr. Vaughan there.

93 Q. Miss Anner Amelia Joyce, is that right?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that

it calls for no evidence competent or material to the issues raised by the plea and replication.

A. Yes.

94 Q. There was another Miss Joyce there on the 11th, and you do not want to get them confused?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

F. 1569 A. No. I reported his condition.

95 Q. Now, what did you say about his condition to Mr. Vaughan, as near as you can remember?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. I told Mr. Vaughan words to this effect: that Mr. Fayerweather was in a critical condition, and that there was nothing more to be done for him, that he was failing fast and probably would not live for any great length of time, and I said, furthermore, that I hoped everything was finished, that there were not

F. 1570 any other papers to sign; and Mr. Vaughan replied, or Miss Joyce, that there was one more very important paper; and I replied I thought it was a shame to disturb a dying man; and Mr. Vaughan asked me how long I thought—if he would live until Monday—this was Saturday—I told him I thought not, that he would probably die that day. He then became very much excited over it, and said he must go at once in order to get a paper ready; I supposed it was some partnership paper, maybe that supposition is not necessary, and I thought that the will and all that matter had been settled, or I should have objected more seriously to his drawing a paper of that kind.

Mr. Bishop: I ask to have stricken out that portion in which he testifies to his suppositions and what he would have done.

96 Q. And did Mr. Vaughan then go away?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. Immediately in haste.

97 Q. In your opinion, Doctor, was Mr. Fayer-
F. 1571 weather in a condition of mind on the 15th day of November, 1890, at the time you informed Mr. Vaughan of his condition and down to the time of his death, to be competent to make a will?

Mr. Bishop: Objected to upon the ground, in the first place, that it does not appear that the witness saw Mr. Fayerweather at that occasion which is referred to; further, upon the ground that the question calls for his opinion, the conclusion of the witness without a detail of the facts and circumstances upon which the opinion is based, and upon the general ground that the evidence is incompetent, irrelevant and immaterial, and upon the further ground that
the opinion of the witness is not competent
F. 1572 upon the evidence already disclosed, and upon the ground that the evidence is irrelevant and immaterial under the issues on this action.

A. I think he was incompetent.

98 Q. From eleven o'clock on November 15th, 1890, down to the time of his death that night, was Mr. Fayerweather rational or irrational, in your opinion?

Mr. Bishop: That is objected to upon the ground that it does not appear that the witness was present during the interval as to which he is called upon to testify, that the question calls for an opinion upon facts and circumstances not disclosed by the testimony

of the witness, and generally, that the opinion of the witness is not competent, and that the evidence is incompetent, irrelevant and immaterial under the issues raised in this action.

A. He was rational; he knew his surroundings and he was able to answer questions at that time.

99 Q. Was he in a condition of mind at eleven o'clock of that day and until the time of his death which qualified him to transact any business or to weigh or to consider any matter of serious judgment?

F. 1573 Mr. Bishop: Objected to upon the ground that the question calls for the opinion of the witness and not for the facts and circumstances; and that the witness is called upon to express an opinion and conclusion upon facts and circumstances not disclosed; and generally, that the opinion of the witness is incompetent and immaterial, and the question is incompetent, irrelevant and immaterial under the issues in this action.

A. No.

100 Q. When did Mr. Fayerweather finally take to his bed and remain there until his death?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the

F. 1574 issues raised by the plea and replication.

A. He did not remain in bed entirely at any time, you may say, sometimes he was sitting in his chair and sometimes in bed, and I do not recollect how long he was confined directly to the house, but it seems to me it was perhaps a month.

Mr. Bishop: I ask to have the latter part of the answer of the witness stricken out as not responsive.

Mr. Sherman: I consent. About the house, is that what you mean?

Mr. Bishop: Yes.

101 Q. To your knowledge, did he get up into his

chair or was he in his chair out of bed after eleven o'clock on the morning of November 15th?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. I do not know.

102 Q. Was he able to raise himself and sit up in bed without assistance after eleven o'clock on the morning of November 15th, 1890?

F. 1575 Mr. Bishop: That is objected to upon the ground that it appears that the witness was not present and did not see the condition of Mr. Fayerweather, and, therefore, he is not capable of forming an opinion: and upon the ground that the evidence is incompetent, irrelevant and immaterial under the issues raised in this proceeding.

A. I do not know.

103 Q. Was he debilitated by his illness on the 15th of November?

Mr. Bishop: That is objected to on the ground that it calls for an opinion without a statement of the facts upon which the opinion is based.

Mr. Sherman: This is an opinion witness.

F. 1576 A. He was debilitated.

104 Q. Was he so much debilitated whenever you saw him at and prior to that time for weeks, that is eleven o'clock on November 15th, 1890, as to require assistance in moving around or in getting out of bed and into a chair?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. Yes, sir; he required assistance.

105 Q. Did his condition involve his lying down or lying propped up in bed?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competant or material to the issues raised by the plea and replication.

A. Well, he was in both positions.

106 Q. Well, did he breathe more easily in one position than in another?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to

F. 1577 the issues raised by the plea and replication.

A. I do not think it made much difference; the majority of the time he was sitting up, propped up by pillows in the bed.

107 Q. When you examined him on the visit of eleven o'clock on the morning of November 15th, when you first entered the room, did you find him propped up by pillows in his bed or lying down?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. I do not remember.

108 Q. Is it your opinion, Doctor, as a

F. 1578 physician, based upon what you knew of his physical condition, from your attending him and your observation of him prior to that time, that Mr. Fayerweather could, in the afternoon of November 15th, without assistance, have sat up in his bed, put his feet over the side of the bed, have taken a paper upon his lap, or a book and a paper, and have signed his name to the paper without assistance?

Mr. Bishop: Objected to upon the ground that the question calls for the conclusion and opinion of this witness upon a state of facts existing at a time when he was not present, and not based upon facts in evidence, and upon the ground that upon the evidence thus far

disclosed in this case there is not sufficient foundation laid for the expression of an opinion by the witness upon the hypothetical conditions stated in the question, and upon the ground that the evidence is immaterial and irrelevant under the issues in this action.

Mr. Sherman: Counsel for complainants protests that the long arguments interposed to each question by counsel for the defendant, under the guise of objections, are in conflict with the settled practice of this Court, and the repeated decisions of the judges
F. 1579 thereof and that the delay and expense should not be placed upon the complainants.

A. He probably would have wanted assistance of some kind.

109 Q. Did you have a nurse or helper or attendant employed to administer massage to Mr. Fayerweather towards the end of his life?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. I do not recollect it.

110 Q. Do you remember Mrs. Goodwin who was there as an attendant and helper?

F. 1580

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. Yes, sir.

111 Q. Well, was she employed there in that way, do you know?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. No, sir; I do not know—I don't know, I only heard of it.

112 Q. You did not get any report from her on the Friday before his death as to his condition?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. No, sir.

113 Q. State whether or not his extremities, F. 1581 his legs to his knees, were cold the night before.

Mr. Bishop: I object to the question as being leading and improper for that reason. The witness may be called upon to state what he saw and heard.

A. Not the night before, but the day of his death they were cold.

114 Q. Well, how early in the day did that condition begin, so far as you observed it?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. How early in the day does it generally be-F. 1582 gin?

115 Q. No, did it in his case?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. I do not know.

116 Q. When did you first notice that his extremities were becoming cold?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. At the visit in the morning of the 15th.

117 Q. And what did that condition indicate to you as a physician?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. That he was dying.

118 Q. What did it indicate to you as to the extent to which he retained control over his body
F. 1583 and his functions at that time?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. Well, that they were impaired, his mind as well as his body were impaired.

Mr. Bishop: I ask to have that stricken out.

119 Q. Could that condition of the coldness of his extremities in his disease as you observed it at eleven o'clock in the morning of the day of his death co-exist, according to your experience as a physician, with any mental vigor or capacity to transact business?

Mr. Bishop: I object to the form of the ques-
F. 1584 tion as improper, and on the ground that the witness cannot be called upon to express opinions except upon facts and circumstances disclosed by him or in the evidence in a hypothetical question.

A. I could not judge from one symptom; his general condition was such, the coldness of his extremities, his respiration, his heart, and his general appearance indicated his condition to me.

120 Q. To be what?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it

calls for no evidence competent or material to the issues raised by the plea and replication.

A. That he was dying.

121 Q. And what in reference to the matters I have inquired of?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. And it impaired of course, his mental and
F. 1585 his physical condition.

122 Q. Well, to what extent?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. Well, to that of incompetency so far as a will was concerned?

Mr. Bishop: I move to strike that out, on the ground that the witness cannot testify to a conclusion.

123 Q. To what extent as regards any exercise of judgment upon matters of business.

Mr. Bishop: That is objected to upon the ground that the witness can only be called upon to state an
F. 1586 opinion upon facts and circumstances either testified to by him or upon a hypothetical question upon evidence adduced by other witnesses.

A. His judgment would be materially impaired.

124 Q. Well, would he be competent to transact any serious business involving judgment at that time?

Mr. Bishop: Objected to as calling for a conclusion and not for the opinion of the witness as an expert or physician.

A. He would not be competent.

125 Q. Now, Doctor, was the appearance he presented at and after that time of being in a dying state such that it was manifest to laymen or only to physicians?

Mr. Bishop: That is objected to as leading and improper in form and as not calling for an opinion based upon the facts and circumstances.

A. It certainly would be to a physician and probably to a layman.

126 Q. Do you wish to be understood as being positive as to who requested you to become a witness to this paper on November 15th, and when the appointment was made for five o'clock?

Mr. Bishop: I object to the question as in-
F. 1587 competent, irrelevant and immaterial, and for the reason that it calls for no evidence competent and material to the issues raised by the plea and replication.

A. I am under the impression that it was Mr. Fayerweather.

127 Q. Who was present at the time?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. I do not recollect that.

128 Q. Well, was this at the time you made this examination at eleven o'clock?

F. 1588 Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. I think it was.

129 Q. Was Miss Anner Amelia Joyce there at the occasion of that visit? That is the lady who is now Mrs. Reynolds, was she present when you were there on that visit?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. Yes, sir.

130 Q. Well, was it she who made that suggestion, or was it Mr. Fayerweather, are you positive?

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. No, sir; I do not recollect positively.

131 Q. May it have been Miss Joyce?

Mr. Bishop: I object to the question as in-
F. 1589 competent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. It may have been, I am not sure who it was.

132 Q. Was Mr. Fayerweather at that time in such a condition of mind or body as to have made such a request?

Mr. Bishop: One moment, I object to that as leading, and calling for the conclusion of the witness.

A. No.

133 Q. Well, upon consideration, what is your best recollection?

Mr. Bishop: I object to the question as in-
F. 1590 competent, irrelevant and immaterial, and for the reason that it calls for no evidence competent or material to the issues raised by the plea and replication.

A. Therefore, simply, I was going to say that I do not remember which did make the request, or who made the appointment with me.

134 Q. Are you positive as to the hour for which the appointment was made on that occasion? You say five o'clock.

Mr. Bishop: I object to the question as incompetent, irrelevant and immaterial, and for the reason that it

calls for no evidence competent or material to the issues raised by the plea and replication.

A. No, sir; I do not remember, I am not so positive of this, five o'clock, that was my only impression.

Mr. Sherman: That is all with Dr. Vedder for the present. I may think of something more later on. I tender the witness for cross-examination.

Mr. Bishop: I suppose our cross-examination will be reserved until Mr. Root is here. I am only acting for him by courtesy.

F. 1591 At Mr. Sherman's request the examination of Dr. Vedder was adjourned to October 14th, at 2 p. m.

MAUS R. VEDDER, M. D.

Adjourned to September 30th, 1898, at 10 p. m.

Mr. Bovee: Counsel for the defendants objects to reading the testimony of the witness Vedder from the Hamilton College record as unauthorized and illegal and unprecedented and insists that the only proper course would be to have the witness testify

F. 1591 in the regular way in the presence of the counsel. We object to his whole deposition as irrelevant and immaterial to the issues presented upon the special pleas. I will say this for the benefit of Dr. Vedder, that it will be impossible for me to conclude his direct this afternoon, or more than conclude it, and that will prevent my cross-examining him to-day, so that he need not wait. I have got to note my objections to these questions.

Mr. Sherman: Oh, I do not know, that is not a very long deposition, and we will have a reasonably long session, I suppose, in view of the short session we had on Saturday.

Mr. Bovee: Defendants object to question 10 upon the ground that it is irrelevant and immaterial to the issues presented upon the special pleas, incompetent, and calling for the opinion and conclusion of the witness, and contrary to Section 834 of the Code calling upon the physician to testify to matters learned by him in his professional capacity as physician to Mr. Fayerweather.

Defendants object to question 11 as incompetent, irrelevant and immaterial, and upon the ground
F. 1593 that the evidence called for by this question is not relevant under the plea and replication and incompetent as a violation of Section 834 of the Code of Procedure of the State of New York.

Defendants object to question 12 as irrelevant and immaterial to the issues presented upon the special pleas.

The same objection to question 13.

Defendants object to question 17 as irrelevant and immaterial to the issues presented upon the special pleas and assuming facts not proven.

Mr. Bovee: I will go on with the objections to Dr. Vedder's testimony.

F. 1594 Defendants object to question 33 as irrelevant and immaterial to the issues presented upon the special pleas, and incompetent.

Defendants object to question 41 as irrelevant and immaterial to the issues presented upon the special pleas, and we move to strike out the entire answer of the witness as irrelevant and immaterial to the issues presented upon the special pleas and incompetent.

Adjourned to February 14, 1901, at 10.30 A. M.

COMPLAINANTS' PROOFS.

NEW YORK, February 14th, 1901.

Met pursuant to adjournment.

F. 1595

Present: The Examiner, Mr. Sherman, Mr. Blaikie, a representative of Root, Howard, Winthrop & Stimson, Mr. Carnochan, Mr. Fain, a representative of Nash & Jones and a representative of Russell & Holmes.

Mr. Bovee: Mr. Sherman, Mr. Carnochan informs me that Mr. Parsons is here and that if Miss Fayerweather and Mr. Reynolds were we could progress with them to-day.

Mr. Sherman: If you finish these objections I will try to get them here.

F. 1596 Mr. Bovee: This afternoon?

Mr. Sherman: No, as soon as you get through with Vedder's direct. How long will you take with that?

Mr. Bovee: About an hour, there were 33 pages.

Defendants object to question 42 as irrelevant and immaterial to the issues raised by the special pleas and incompetent, calling for the conclusion of the witness and not for the fact.

Mr. Sherman: Counsel for the complainants again tenders to the counsel for the defendants a stipulation that they may, in lieu of inserting objections in the rec-

ord after each question, take and present at final hearing every objection to form and substance which they see fit to take with the same force and effect as if such objections were taken before the answer to each question.

Mr. Bovee: Defendants object to question 43 as irrelevant and immaterial to the issues presented upon the special pleas.

Same objection to question 44.

F. 159 Same objection to question 45.

Same objection to question 48.

Mr. Sherman: I trust Mr. Bovee thoroughly understood that I would not consent to the interruption of this present proceeding merely because Mr. Parsons chooses to come here, and I have tendered him this stipulation in order that the responsibility of any delay may rest on him and not on me.

Mr. Bovee: Defendants object to question 49 as incompetent, irrelevant and immaterial and not within any of the issues presented upon the special pleas.

Defendants object to question 50 as irrelevant and immaterial to the issues presented upon the special pleas and as incompetent, improper in form

F. 1598 and leading; and they move to strike out the answer after the words "Yes, sir" as not responsive to the question.

Defendants object to question 51 as improper in form, incompetent, calling for the conclusion of the witness and leading, and irrelevant and immaterial to the issues presented upon the special pleas, and they move to strike out all after the word "Yes" as not responsive to the question and incompetent.

Defendants object to question 57 as irrelevant and immaterial to the issues presented upon the special pleas.

Same objection to question 58.

Same objection to question 59.

Same objection to question 60.

Same objection to question 61.

Same objection to question 62.

Same objection to question 63, and the further objection that it is incompetent.

Defendants object to question 64 as irrelevant and immaterial to any of the issues presented on the special pleas and as incompetent.

Defendants object to question 67 as irrele-
F. 1599 vant and immaterial to the issues raised by the special pleas, incompetent, a violation of Section 834 of the Code ofC ivil Procedure of the State of New York, it appearing that the witness was the medical adviser and physician of the deceased, and calling for the opinion and conclusion of the witness and not a fact.

Defendants object to question 68 as irrelevant and immaterial to the issues presented upon the special pleas and move to strike out all after the words "11 o'clock" as not responsive to the question and as irrelevant and immaterial and incompetent and calling for the opinion and the conclusion of the witness and not for a fact, and a violation of
F. 1599 Section 834 of the Code of Civil Procedure, it appearing that the witness was the medical adviser and attendant of the deceased.

Defendants move to strike out all of the answer to question 79 after the words "10 o'clock" as not responsive to the question and irrelevant and immaterial to the issues raised upon the special pleas.

Defendants object to question 81 as irrelevant and immaterial to the issues presented by the special pleas and calling for conclusions and not a fact and incompetent.

Defendants object to question 82 as irrelevant and immaterial to the issues presented upon the special

pleas and incompetent, calling for a conclusion and not a fact.

Defendants object to question 83 as irrelevant and immaterial to the issues presented by the special pleas and incompetent.

Same objection to question 84.

Same objection to question 85.

Same objection to question 86.

Defendants object to question 87 as irrelevant and immaterial to the issues presented upon the
F. 1601 special pleas.

Same objection to question 88.

Same objection to question 89.

Same objection to question 90.

Same objection to question 92, and the further objection that it is incompetent.

Defendants move to strike out the answer to question 94 after the word "No" as not responsive to the question and as incompetent, irrelevant and immaterial.

Defendants object to question 95 as irrelevant and immaterial to the issues presented upon the special pleas as incompetent and a violation of Section 834 of the Code of Civil Procedure, and they move to
F. 1602 strike out the answer of the witness as incompetent and a violation of Section 834 of the Code in disclosing information acquired by the physician in the course of his professional relation to the patient and giving his conclusions and opinions and suppositions and not facts.

Defendants object to question 96 as irrelevant and immaterial to the issues presented upon the special pleas.

Defendants object to question 97 as irrelevant and immaterial to the issues presented upon the special pleas, incompetent and calling for the opinion of the witness upon matters as to which he is not permitted to testify, and a violation of Section 834

of the Code of Civil Procedure, and calling for the opinion of the witness as to the condition of Mr. Fayerweather at a time when the witness did not see him.

Mr. Sherman: Pardon me, Mr. Bovee, but Judge Truax desires to have us go over there now. Can you get Mr. Parsons to attend to that?

Mr. Bovee: I think so. I will ring Mr. Parsons up on the telephone.

Defendants object to question 99 as irrelevant F. 1603 and immaterial to the issues presented upon the special pleas, incompetent, in calling for the opinion and conclusion of the witness and a violation of Section 834 of the Code of Civil Procedure and calling for the opinion and conclusions of the witness upon facts and circumstances not disclosed.

Mr. Bovee: We do not care to examine Judge Truax any further.

Defendants object to question 100 as irrelevant and immaterial to the issues presented upon the special pleas and calling for the opinion and conclusion of the witness and incompetent.

Defendants object to question 103 as irrelevant F. 1604 and immaterial to the issues presented upon the special pleas, and incompetent, and calling for the opinion of the witness as to matters which he is prohibited from disclosing under Section 834 of the Code of Civil Procedure.

Defendants object to question 104 as improper in form and leading, irrelevant and immaterial to the issues presented by the special pleas, incompetent and calling for the opinion of the witness, and a violation of Section 834 of the Code of Civil Procedure.

Defendants object to question 108 as improper in form and leading, and irrelevant and immaterial to the issues presented upon the special pleas, incompetent in calling

for the opinion and conclusion of the witness and a violation of Section 834 of the Code of Civil Procedure.

Defendants object to question 110 as irrelevant and immaterial to the issues presented upon the special pleas and incompetent.

Defendants move to strike out so much of the answer to question 111 as follows: "I only heard of it," as not responsive to the question and incompetent and hearsay.

Defendants object to question 113 as improper
F. 1605 in form and leading, and irrelevant and immaterial to the issues presented upon the special pleas, and incompetent and a violation of Section 834 of the Code of Civil Procedure.

Defendants object to question 116 as irrelevant and immaterial to the issues presented upon the special pleas, as incompetent and a violation of Section 834 of the Code of Civil Procedure.

Defendants object to question 117 as irrelevant and immaterial to the issues presented upon the special pleas, as incompetent, and calling for the opinion and conclusion of the witness and a violation of Section 834 of the Code of Civil Procedure.

Defendants object to question 118 upon the
F. 1606 same ground.

Same objection to question 119.

Same objection to question 120.

Same objection to question 121.

Same objection to question 122.

Same objection to question 123.

Same objection to question 124.

Same objection to question 125.

Defendants object to question 132 as improper in form and leading and incompetent, irrelevant and immaterial to the issues presented upon the special pleas, incompetent in calling for the opinion and conclusion of the

witness and hypothetical, and a violation of Section 834 of the Code of Civil Procedure and not calling for facts.

Defendants object to question 136 as improper in form and leading, irrelevant and immaterial to the issues presented upon the special pleas, incompetent and in violation of Section 834 of the Code of Civil Procedure, the witness having been the professional medical attendant of Mr. Fayerweather and the question calling for information acquired by him in his
F. 1607 professional capacity, and calling for the opinion and the conclusion of the witness and not the facts.

(At this point Complainants' proofs were suspended and Defendants' proofs taken up.)

Mr. Parsons: I would like to finish my deposition. I suggest a small addition to it.

Mr. Sherman: I have no objection.

F. 1608 Continuation of the examination of *JOHN E. PARSONS.*

The Witness: I have read over my testimony as transcribed by the stenographer, and with the exception of some verbal errors, which are corrected by the context—I remember one case where "relevant" or "irrelevant" is stated when it should be *vice versa*—I am ready to sign. I wish to add that I have an indistinct recollection that at the beginning of my conversation with Mr. Coudert, some sum in gross was mentioned that subsequently separate sums were mentioned for Mrs.

Fayerweather and the nieces, and that it was Mr. Coudert who proposed this.

Signed,

JNO. E. PARSONS.

Sworn to before me this 15th day of February, 1901.

JOHN A. SHIELDS,
Examiner.

F. 1609 Recess until 2.30 P. M.

AFTER RECESS.

Continuation of the direct examination of *MAUS R. VEDDER.*

By Mr. Sherman:

140 Q. Dr. Vedder, you were present, were you not, at the occasion when Mr. Daniel B. Fayerweather died on the 15th——

Mr. Bovee: What is this? I thought Dr. Vedder was here to be examined by me.

Mr. Sherman: I am going to ask him some
F. 1610 more questions, if I may be permitted to frame them without interruption.

141 Q. Dr. Vedder, you were present, were you not, at the occasion when Mr. Daniel B. Fayerweather died on the 15th day of November, 1890?

A. I was.

142 Q. How long before his death did you go into his room?

A. I was at his bedside when he died.

143 Q. And how long had you been in the room before he died?

A. Probably half an hour.

144 Q. I will ask you to describe his condition and

symptoms as accurately as you can during all that time until he actually expired?

Mr. Bovee: Counsel for the defendants objects upon the ground that it is irrelevant and immaterial to the issues presented upon the special pleas, incompetent, and a violation of Section 834 of the Code of Civil Procedure, calling upon the witness to testify to matters which came within his knowledge through his professional relation with the deceased, also on the ground that the witness had already been examined
F. 1611 upon the same subject.

A. He had the usual symptoms of a dying man, that is his extremities were cold, his respiration was very rapid and shallow, his pulse was rapid and very weak, a certain amount of rales in the lungs and in the throat, his color was cyanic or blue, and then towards the last he began to breathe irregularly, his heart fluttered and finally he had the death rattle and the death shudder.

145 Q. How long before the actual death of Mr. Fayerweather had he been able to inflate his lungs sufficiently to oxygenate his blood?

Mr. Bovee: Counsel for the defendants objects to the question as irrelevant and immaterial to the
F. 1612 issues presented on the special plea, as incompetent, as calling for the opinion of the witness and a violation of Section 834 of the Code of Civil Procedure calling upon the witness to testify upon matters acquired by him in a professional capacity as physician to the deceased.

(At the request of the witness, question No. 145 was repeated by the stenographer.)

A. Well, he had been more or less dependent upon oxygen to the best of my recollection for a week or ten days.

146 Q. Artificial oxygen? A. Yes.

147 Q. And in what manner was that administered to him?

A. Compressed, in a compressed tank, where the oxygen, take a hundred pounds for example in the tank and he inhales from that.

148 Q. Through a tube passed through water?

A. Yes, sir.

149 Q. How frequently had he inhaled oxygen from the tank?

Mr. Bovee: Same objections.

F. 1613 A. I do not know; frequently, according to directions; he was directed to do it whenever he felt like it or chose to take it.

150 Q. Do you remember whether it was cold weather?

Mr. Bovee: Same objections.

A. About the time of the blizzard, I think.

151 Q. Does a person in the last stages of consumption find it easy or difficult to inflate the lungs with air?

Mr. Bovee: Objected to as irrelevant and immaterial to the issues presented upon the special pleas.

A. With difficulty.

152 Q. Can you say whether or not any part, and if so, what part, of the structure of the lungs had been impaired?

Mr. Bovee: Counsel for the defendants objects

F. 1614 to the question as irrelevant and immaterial to the issues presented upon the special pleas, incompetent, a violation of Section 834 of the Code of Civil Procedure in calling for the information acquired by the physician in his professional relation to the deceased.

A. Both lungs were saturated with tubercle.

153 Q. Does the presence of tubercle in the lungs occupy the space which in a normal condition the lungs afford to the access of air?

Mr. Bovee: That is objected to as irrelevant and immaterial to the issues presented upon the special pleas.

A. It does.

154 Q. Does the ability of a human being to receive into the lungs a normal quantity of oxygen affect the condition of the blood?

Mr. Bovee: Objected to as irrelevant and immaterial to the issues presented upon the special pleas.

A. It does.

155 Q. Does the impairment of the blood by that means affect the integrity and use of the mental faculties?

Mr. Bovee: Defendants object to the form of
F. 1615 the question as improper and leading, and the question is irrelevant and immaterial to the issues presented upon the special pleas.

(At the request of the witness, question No. 155 was repeated by stenographer.)

A. To a degree.

156 Q. Is there any period short of death when, in consumption, the impairment of the blood for lack of oxygen affects the brain or the mental faculties to a degree which prevents the patient from comprehending what is going on about him or the nature of his acts?

Mr. Bovee: We object to the question as improper in form and leading, as irrelevant and immate-
F. 1616 rial to the issues presented upon the special pleas, as incompetent, calling for the opinion of the witness on matters not in issue in this case.

(At the request of the witness, question No. 156 was repeated by stenographer.)

A. It impairs the memory, that is, the air not being oxygenated and carbonic acid accumulating in the blood, that is in consumption?

157 Q. The air not being oxygenated?

A. Yes, that is the air being inspired prevents it

being oxygenated and carbonic acid is retained for that reason, it impairs his memory or his mind.

158 Q. Do you wish to add to your answer, doctor?

A. What I meant to say was that the condition of Mr. Fayerweather's illness was that in breathing he did not receive a full amount of oxygen and the carbonic acid accumulated in the blood for the reason that he did not expire it, did not throw it out.

Mr. Bovee: Defendants move to strike out the answer as not responsive to the question, as irrelevant

F. 1617 and immaterial to the issues presented upon the special pleas, as incompetent in giving the opinion and conclusion of the witness and not testifying to a fact, and in violation of Section 834 of the Code of Civil Procedure in testifying to information acquired by him in his professional capacity as physician for Mr. Fayerweather.

159 Q. In a normal condition, does the expired air from the lungs take out with it carbonic acid gas?

Mr. Bovee: That is objected to as irrelevant and immaterial to the issues presented upon the special pleas.

A. It does.

160 Q. Does the retention of carbonic acid gas in the system produce blood poisoning?

F. 1618 Mr. Bovee: Same objection.

A. It does not produce directly blood poisoning, but it carbonizes the blood.

161 Q. Does the presence of the carbonic acid gas in the blood, as a matter of scientific knowledge, stupefy the person in that condition?

Mr. Bovee: That is objected to as irrelevant and immaterial to the issues presented upon the special pleas, and incompetent. A. To a degree.

Mr. Sherman: I now tender the witness for cross-examination.

Mr. Bovee: The defendants, Hamilton College, will stand upon all the objections taken to the witness

Vedder, but decline to cross-examine said witness on the ground that his testimony is entirely irrelevant and immaterial to any of the issues raised by its plea to the cross bill: and furthermore, moves to strike out the whole of said testimony upon that ground.

On behalf of the defendants filing the pleas and as to whom this examination is made, except the defendant Hamilton College, counsel for the defendants protests against being compelled to cross examine on matters which are irrelevant to the issues by the
F. 1619 special pleas, and in cross-examining the witness said defendants do not waive their objection that such matter is irrelevant and immaterial. They make a cross-examination and insist that it is in the nature of a *de bene esse* examination, conditioned on the Court holding that the direct examination of the witness is relevant and material, and before proceeding with the cross-examination defendants repeat the stipulation to strip the case of all irrelevant matter, meaning by that matter which is irrelevant to the only issue which they understand to be before the Court, that of estoppel of the judgment in Amherst College and others against Ritch, which they have pleaded in bar, and before proceeding with
F. 1620 the cross-examination, defendants move upon the record to strike out all the testimony of the witness as irrelevant and immaterial to the issues raised by the pleas.

Cross-examination by Mr. Bovee:

162 xQ. Doctor, you remember that there was a contest over the will and codicils of Mr. Fayerweather in the Surrogate's Court in this county, do you not?

A. Yes, Sir.

163 xQ. That was very soon after his death, was it not?

A. It was soon after his death.

164 xQ. In the months of January and February, 1891, was it not?

A. I do not remember the date.

165 xQ. You do not recall that it was within a few months after his death.

A. I do.

166 xQ. You were there? A. I was.

167 xQ. A witness? A. I was.

168 xQ. Gave testimony? A. I did.

F. 1621 169 xQ. Examined by Mr. Frederic R. Coudert, were you not?

A. I was.

170 xQ. By Judge Rollins? A. Rollins, yes, sir.

171 xQ. And you understood those two gentlemen to represent the contestants in that proceeding?

A. I believe so.

172 xQ. Mr. Coudert representing Mrs. Fayerweather?

A. Yes.

173 xQ. And Judge Rollins the next of kin, the nieces of Mr. Fayerweather?

A. That I do not know about.

174 xQ. You know that he did represent

F. 1622 some Fayerweather heirs?

A. Yes, sir.

175 xQ. You remember also, doctor, that there was a proceeding in the Supreme Court before Judge Truax?

A. Yes, sir.

176 xQ. That was the case of Amherst College and others against Ritch?

A. The colleges, as I understood it, against Ritch.

177 xQ. You were also there?

A. I was.

178 xQ. Called as a witness?

A. I was.

179 xQ. You were upon the stand and gave testimony?

A. No, it was excluded.

180 xQ. Doctor, now be sure. You were called as a witness? A. Yes, sir.

181 xQ. Put upon the stand and asked questions?

A. No, they excluded me.

182 xQ. Well, but you were asked some questions, you were called as a witness, were you not?

A. Yes, sir, called on the stand and Judge Tru-
F. 1623 ax—they made an objection to me as a physician and Judge Truax excused me.

183 xQ. That is do I understand you to say that Judge Truax held that you were not competent to testify as to matters within your knowledge in respect to Mr. Fayerweather?

Mr. Sherman: Objected to on the ground that the rulings in the Five College action are matters of law and immaterial here, and if material are not to be proved in this way.

A. The question is whether I was before Judge Truax twice.

Mr. Bovee: That is not the question.

F. 1624 (Question 183 repeated by stenographer.)

The Witness: Yes, sir.

184 Q. That was your understanding, was it?

A. That was my understanding when he excused me, I think, unless I was before him twice.

185 xQ. Well, what is your recollection as to how many times you were before him?

A. I can only remember once, but I may be at fault, my memory is not as good as it used to be.

186 xQ. Doctor, when was that trial before Judge Truax, in what year?

A. I do not remember that.

187 xQ. Well, it was since the death of Mr. Fayerweather?

A. Oh, yes, it was the last time that I was called before this.

188 xQ. It was several years after the death of Mr. Fayerweather?

A. Yes, sir.

189 xQ. Is it not your recollection that that was in 1894?

A. No, it was later than that. If my mem-
F. 1625 ory could be refreshed as to whether I was be-
fore Judge Truax twice, why then I was a witness at one time in which I testified, and the last time time I did not testify.

190 xQ. Is it your recollection that it was in 1896, the Truax trial?

A. Well, it is my impression that it was maybe four or five years ago.

191 xQ. Four or five years ago, that is your recollection?

A. That is the first time I was excused.

192 xQ. By whom were you called in the Truax trial, by which parties to the litigation?

A. I do not know.

F. 1626 193 xQ. Was it Mrs. Fayerweather's executor and the next of kin?

A. That I do not remember.

194 xQ. You do not remember?

A. No.

195 xQ. Doctor, when did you testify last in this case?

A. I think I have testified three times, once before the Surrogate, and then the second time I do not remember, and then the last time before Judge Truax I was called.

196 xQ. Was that the last time?

A. Yes, sir, that is the last time I testified to the best of my recollection.

197 xQ. Have you been in this room before, before yesterday? A. Yes, sir.

198 xQ. When?

A. I do not remember that.

199 xQ. Did you not on that occasion give testimony in this case?

A. I think I did.

200 xQ. Were you not examined by my friend, Mr. Sherman? A. I was.

201 xQ. When was that, doctor?

F. 1627 A. I do not remember the date.

202 xQ. Well, in what year was it?

A. It might have been a year or two ago.

203 xQ. Well, was it one year or two years ago.

A. I do not know.

204 xQ. Was it in 1897?

A. It might have been.

205 xQ. Was it in 1899?

A. I do not recall it, sir.

209 xQ. Impossible for you to say nearer than you have in what year it was?

A. Yes, sir.

207 xQ. Are you able to say in what month of the year it was?

F. 1628 A. No, sir.

208 xQ. Whether summer, spring, or fall or winter?

F. 1625 (Question not answered.)

209 xQ. Do you understand, doctor, that I am cross-examining you on the testimony which you gave in this room on the occasion that you have referred to?

Mr. Sherman: Objected to because it is immaterial, and because it is impossible for this witness to say what operations of Mr. Bovee's mind induce him to ask questions.

(At the request of this witness question No. 209 was repeated by stenographer.

A. No, sir.

210 xQ. Do you know what testimony you gave when you were here before?

A. No, sir; I have not the remotest memory of it.

211 xQ. No recollection of it now whatever?

A. No, sir.

212 xQ. Do you remember the subject upon
F. 1629 which you were examined by Mr. Sherman in this case?

A. I do not.

213 xQ. Prior to the time that you gave that testimony had you taken the precaution to refresh your recollection in respect to the matters occurring just preceding the death of Daniel B. Fayerweather?

A. No, I remember them distinctly yet.

214 xQ. You remember them distinctly yet?

A. Yes, sir, at this time. I did refer, yes, sir, I did read that.

215 xQ. You read what?

A. My testimony that I have given before.

216 xQ. The testimony that you had given
F. 1630 where?

A. Every time that I had been called upon.

217 xQ. How many times that you had been called upon.

A. Twice to my recollection.

218 xQ. Once in the Surrogate's Court and once before Judge Truax?

A. I do not remember I say whether that was before Judge Truax or not, whoever the judge was, I have forgotten, it may have been Judge Truax.

219 xQ. But you did refresh your recollection by reading from the testimony that you had given immediately following the death of Mr. Fayerweather?

A. Oh, yes, sir, I read it, but I already know the testimony that I had given and recollect it still.

220 xQ. Doctor, how long had you known Mr. Fayer weather.

A. Well, fifteen or twenty years.

221 xQ. Been his medical adviser for that period of time?

A. And his friend.

222 xQ. And his friend. A. Yes, sir.

223 xQ. But primarily his medical adviser?

F. 1631 A. For fifteen years, yes, sir.

224 xQ. And that had continued up to the time of his death? A. It did.

225 xQ. Your relations with him were very close and very intimate. A. Yes, sir.

226 xQ. The matters as to which you have testified here in this case, the information which you have testified to in this case was information acquired by you in your capacity as medical adviser and examiner of Mr. Fayerweather, was it, is that right?

A. How is it?

(At the request of the witness, question 226 was repeated by the stenographer.)

F. 1632

A. Yes.

227 Qx. How many times did you see Mr. Fayerweather on the 15th of November?

A. That was the day of his death.

228 xQ. That was the day of his death?

A. Twice.

229 xQ. In the morning? A. About noon time.

230 xQ. And again at night?

A. Yes, sir, when he died, about ten o'clock.

231 xQ. Did you speak to him at noon when you saw him?

A. I examined him.

232 xQ. Did you speak to him? A. I did.

233 xQ. And did he speak to you?

A. He answered with "Yes" and "No."

234 xQ. Do you recall, doctor, what you said to Mr. Fayerweather on that occasion?

A. I call some of the things that occurred at at that time.

235 xQ. What did you say to Mr. Fayerweather weather on that occasion?

A. No, I do not recall, at 11, at recall what occurred at the time of his death.

F. 1633 236 xQ. At night?

A. Yes, sir; only asking him the usual—asking him a few questions in regard to his condition at noon.

237 xQ. He understood your inquiries, doctor?

Mr. Blaikie: Objected to as incompetent and irrelevant and immaterial and no foundation laid for it.

A. Well, yes, he could have understood the questions that I asked at that time.

238 xQ. And he responded to your question?

A. By simply "yes" and "no."

239 xQ. His responses to your questions, Dr. Vedder, were intelligent, were they not?

Mr. Blaikie: Objected to on the same grounds.

A. Yes, sir, he could answer the questions,

F. 1633 that is, a simple question he could have answered.

240 xQ. And in giving the answers to your questions that you put to him he gave intelligent responses, did he not, conveying to your mind his meaning?

Mr. Blaikie: Objected to upon the same grounds.

A. Not sentences.

241 xQ. Not sentences, but his answers whatever they were.

Mr. Blaikie: Same objection.

A. By a yes or a no or a nod.

242 xQ. And his responses were intelligent to your questions, were they not?

Mr. Blaikie: Same objections.

A. Well, he could understand, yes, sir.

243xQ. And he made you understand his responses, did he not?

Mr. Blaikie: Objected to on the same grounds and not cross-examination of anything that has been brought out.

A. Yes, sir.

243 xQ. And in making his responses to your questions in that way he made an intelligent re-
F. 1535 sponse to your mind, did he not, doctor?

Mr. Blaikie: Objected to on the same grounds.

A. There were only very few questions asked, and whether these answers were correct or not, of course I could not say any further than they were small, that is for example "Do you feel better?" "Do you have pain?" Small questions of that kind and he would say yes and no or nod.

245 xQ. Now, doctor, you know whether when he did answer in the way that you have indicated, whether his answer was responsive and intelligent, do you not?

Mr. Blaikie: Same objections.

A. They appeared to be intelligent.

246 xQ. They appeared to be intelligent?

F. 1636 A. They appeared to be in answer to my questions.

247 xQ. And his answers were intelligent answers were they not showing that Mr. Fayerweather understood?

Mr. Blaikie: Same objections.

A. Well, I could not tell whether he responded directly or not, he was in that weakened condition or state, I could not tell that now whether he answered intelligently or not.

248 xQ. You understood his meaning when he gave those responses in that way, did you not?

Mr. Blaikie: Same objection.

A. "Yes," and "No"; certainly I know what that means.

249 xQ. Yes.

A. That is the only answer I could rely on, in fact, the questions were not asked for any definite purpose either, his condition was weakened and he was very weak and I did not disturb him, I only asked him a few questions and went out of the room and into the back room where Miss Joyce and Mr. Vaughan were.

250 xQ. How long were you with Mr. Fayer-
F. 1637 weather at that time?

Mr. Blaikie: Same objection.

A. Not certainly over five or ten minutes.

251 xQ. Five or ten minutes?

A. Yes, sir.

252 xQ. Are you able to recall any one question that you asked Mr. Fayerweather at that time?

Mr. Blaikie: Same objections.

A. No, I could not recall it positively.

253 xQ. But you do recall that you asked him several?

Mr. Blaikie: Same objections.

A. Yes, sir.

254 xQ. How far were you from Mr. Fayerweather when you asked him those questions?

F. 1638 Mr. Blaikie: Same objections.

A. At his bedside.

255 xQ. At his bedside? A. Yes, sir.

256 xQ. You were satisfied that he heard your inquiries when you made them?

Mr. Blaikie: Same objections and as calling for a conclusion also.

A. I do not know that.

257 xQ. He made a response to your question, did he not?

Mr. Blaikie: Same objections.

A. He did.

258 xQ. And you understood by his response—

A. By "Yes" or "No," if you call that a response or a nod of the head.

259 xQ. And by his response you were given to understand that he had heard your inquiry, were you not?

Mr. Blaikie: Same objections.

A. I presumed he had.

260 xQ. In asking him those questions, doctor, did you speak in an ordinary tone of voice?

Mr. Blaikie: Same objections.

A. I probably did.

F. 1639 261 xQ. Did you?

A. I think I did, I think I spoke in an ordinary tone.

262 xQ. About as you are talking now? A. Yes, sir.

263 xQ. How far was it possible for you to have heard in speaking in that tone of voice across the room?

Mr. Blaikie: Same objections.

A. Well, that I do not remember.

264 xQ. But it was in an ordinary tone of voice?

Mr. Blaikie: Same objections.

A. I think it was.

265 xQ. That was about the tone of voice in which you had been in the habit of talking to Mr. Fayerweather?

Mr. Blaikie: Same objections.

F. 1640 A. Probably so.

266 xQ. You did not have to speak any louder on that occasion?

Mr. Blaikie: Same objections.

A. I do not recollect of speaking only in an ordinary tone.

267 xQ. And in convresing with Mr. Fayerweather upon previous occasions your conversation with him had been conducted in the ordinary tone of voice had it not?

Mr. Blaike: Same objections.

A. Yes, sir.

268 xQ. You have said that you were there on the 11th of November, 1890?

Mr. Blaikie: Same objections.

A. Yes, sir.

269 xQ. Do you remember that.

Mr. Blaikie: Same objections.

A. Yes, sir.

270 xQ. And that upon that occasion a lawyer was present, also Dr. Wilcox?

Mr. Blaikie: Same objections.

A. Yes, Mr. Butler.

271 xQ. Who was it?

F. 1641 A. Mr. Butler, the lawyer who drew it up.

272 xQ. Butler, yes.

A. Dr. Wilcox and Miss Joyce?

272 xQ. Do I understand you to say that you were requested to sign that paper as a witness by Mr. Fayerweather?

Mr. Blaikie: Same objections.

A. Yes, sir, in his presence.

274 xQ. You had conversation with him at that time?

Mr. Blaikie: Same objections.

A. I did.

275 xQ. And in addressing Mr. Fayerweather on that day did you use about the same tone of voice in speaking to him that you did on the 15th of Novem-

F. 1542 ber?

Mr. Blaikie: Same objections and leading.

A. I think so.

276 xQ. About the same?

A. Yes, sir.

277 xQ. At what hour was it that you saw Mr. Fayerweather on the night of the 15th of November, the day of his death?

A. About ten o'clock the last time.

278 xQ. About ten o'clock.

A. At the time of his death.

279 xQ. Did I understand, doctor, that you remained with him until his death at that time?

A. Yes, sir.

280 xQ. And he died at what time?

A. In the neighborhood of ten, between ten and eleven o'clock.

281 xQ. Between 10 and 11?

A. On the 15th.

282 xQ. Did you speak to him upon that occasion, doctor, when you came in?

A. I did.

283 xQ. Was any response made by Mr. Fayer-
F. 1643 weather to your question?

A. He tried to respond but he could not.

284 xQ. Did he nod his head to any question or move his head? A. No.

285 xQ. When you say he tried to respond——

A. He tried to make me understand something that he wanted.

286 xQ. Then he did understand your question, did he not?

Mr. Blaikie: Objected to as leading.

A. It was—perhaps you will allow me to explain?

287 xQ. No, doctor, perhaps you will have an opportunity a little later?

A. I mean it might help you, but not me par-
F. 1644 ticularly.

288 xQ. I have this in my mind, now?

A. What is the question?

(Question No. 286 repeated by stenographer.)

The Witness: He did not.

289 xQ. You say he tried to make some response to your inquiry?

Mr. Blaikie: Same objections.

A. He tried to make a want of his own known to me.

290 xQ. He knew that you had spoken to him?

Mr. Blaikie: Same objections.

A. He knew I was there.

291 xQ. He saw you speak to him?

Mr. Blaikie: Same objections.

A. He probably did.

292 xQ. He looked at you?

Mr. Blaikie: Same objections.

A. Yes, sir.

293 xQ. And did you speak to him?

F. 1645 Mr. Blaikie: Same objections.

A. I spoke to him, yes, and asked him questions.

294 xQ. And he saw that you were asking him questions, did he not?

Mr. Blaikie: Same objections and calling for a conclusion.

A. I do not know.

295 xQ. Now, doctor, I want to be perfectly fair with you and you state that you desire to make an explanation; you may go ahead and say what was in your mind?

A. He tried to convey to me that he wanted something, and he pointed his finger towards his

F. 1646 mouth and I said to him "Do you want a drink?" and he said "Ah-ha-ha," a short sentence in that way; and I said, "Can't you breathe?" and he made the same motion; and another question which I have forgotten and he still made a third time "Ah-ha" and then after that expired. That is what I mean by trying to convey to me something and did not succeed.

296 xQ. So that it was apparent to your mind that he had something in his mind which he wished to communicate to you?

A. Yes, sir.

297 xQ. And he was physically incapable of doing it?

Mr. Blaikie: Objected to as leading.

A. And mentally. I wish to say that I can recall any testimony that I have given, I think, but I could not recall the dates or whom I was before.

298 xQ. Were you Mrs. Fayerweather's physician?

A. Yes, sir.

Mr. Blaikie: Same objection and irrelevant and immaterial and not cross-examination.

The Witness: Not at the time of her death.

F. 1647 Do you mean that?

299 xQ. Yes.

A. No, not at the time of her death.

300 xQ. Were you her physician at the time of Mr. Fayerweather's death?

Mr. Blaikie: Same objections. A. Yes.

301 xQ. How soon after the death of Mr. Fayerweather did you cease to be her medical examiner?

Mr. Blaikie: Same objections.

A. She left the city, she was not in the city at the time that she died.

302 xQ. Did she have any other medical adviser?

Mr. Blaikie: Same objection.

A. Do you mean in the city?

F. 1648 303 xQ. Yes.

Mr. Blaikie: Do you mean in the city?

303 xQ. Yes.

Mr. Blaikie: Same objections.

A. I do not think so.

304 xQ. Is Dr. Wilcox your partner now?

Mr. Blaikie: Objected to as immaterial.

A. No, sir.

305 xQ. He is in the city.

Mr. Blaikie: Same objection.

A. He is.

306 xQ. He was your partner at that time?

Mr. Blaikie: Same objection.

A. Yes, sir.

307 xQ. And was he also, through his association with you, the physician of the Fayerweather family?

Mr. Blaikie: Same objection and leading.

A. No.

308 xQ. Was any other physician attending Mr. Fayerweather at that time other than yourself?

A. I think he had one other physician.

309 xQ. Who was it?

A. Dr. Irwin, I think; saw him once.

F. 1649 310 xQ. He saw him once?

A. That is in the city, and I think he saw him at Greenwich.

311 xQ. Did you ever see Dr. Irwin there?

Mr. Blaikie: Objected to as immaterial and not cross-examination.

A. No.

312 xQ. At the time that Mr. Fayerweather died, according to your observation, who cared for him in the house?

Mr. Blaikie: Objected to as immaterial and not cross-examination, and incompetent and no foundation laid for it.

A. Miss Joyce—Mrs. Reynolds.

F. 1650 313 xQ. Anybody else?

Mr. Blaikie: Same objection.

A. Mrs. Fayerweather did something, but Miss Joyce principally.

314 xQ. Anybody else?

Mr. Blaikie: Same objection.

A. None that I know of.

315 xQ. None that you know of?

A. No, sir.

316 xQ. So far as you know they were the only persons who had anything to do with his care or nursing?

Mr. Blaikie: Same objection.

A. Yes, sir.

317 xQ. That was true throughout the entire illness of Mr. Fayerweather, was it not?

Mr. Blaikie: Same objection.

A. Yes, sir.

318 xQ. I mean the illness which resulted in his death?

Mr. Blaikie: Same objection.

A. Do you refer to his nursing?

319 xQ. Yes, sir: that they were the only
F. 1651 persons who had anything to do with him in respect of his care?

Mr. Blaikie: Same objection.

A. Yes, sir.

320 xQ. Doctor, at what time of the day was it on the 11th of November when you saw him sign a paper?

Mr. Blaikie: Same objection.

A. About noon.

321 xQ. About noon?

A. I think so?

322 xQ. Where was he when he signed that paper?

Mr. Blaikie: Same objection.

A. He was in the front room, second floor
F. 1652 front.

323 xQ. Not in his bedroom?

Mr. Blaikie: Same objection.

A. No, in a wheel chair.

324 xQ. In a wheel chair? A. Yes, sir.

325 xQ. What was the distance from his bed to this table at which he sat in the front room in his wheel chair?

A. The distance from where.

326 xQ. From his bed in the bedroom.

A. The bedroom was in the back room.

327 xQ. So I understand.

A. He was wheeled into the front room.

328 xQ. Yes, and about how many feet was that?

Mr. Blaikie: Same objection.

A. Well, it might be thirty-five feet.

329 xQ. xQ. Thirty-five feet?

A. Yes, sir.

330 xQ. How long did he remain in this wheel chair at that table on that day?

Mr. Blaikie: Same oblection.

A. Until the lawyer, Mr. Butler, had finished F. 1653 reading the paper.

331 xQ. Yes, how long was that?

A. It might have been four or five sheets of paper, it might have taken him twenty minutes.

332 xQ. Was Mr. Butler across the table from him?

Mr. Blaikie: Same objection and leading also.

A. He was I think at one end of the table and Mr. Fayerweather was at the other end of the table.

333 xQ. And how many feet apart, how far apart?

Mr. Blaikie: Same objection.

A. That table might have been five feet long.

334 xQ. Did Mr. Butler in reading that paper speak in an ordinary tone of voice?

Mr. Blaikie: Same objection.

F. 1654 A. I think he did.

335 xQ. And Mr. Fayerweather did speak upon that occasion and say something, did he not?

Mr. Blaikie: Same objection.

A. He did.

336 xQ. And in so speaking was his utterance clear and distinct?

Mr. Blaikie: Same objection.

A. Well, he was breathing, a breath between every word or two, but it could be distinctly understood, his sentences were short.

337 xQ. When he signed the paper did he have on his spectacles? A. Yes, sir.

338 xQ. Any more than one pair?

A. I think only one pair.

339 xQ. One pair? A. I think so.

340 xQ. Did he use a magnifying glass?

A. He often did.

341 xQ. Did he upon that occasion?

A. I do not think he did.

342 xQ. Doctor, what was it that you said as to what Mr. Fayerweather did in respect to his signature; do you recall his attention being called to the fact

F. 1655 that the fountain pen did not recall the last two letters of his name?

Mr. Blaikie: Objected to as incompetent, irrelevant and not cross-examination.

A. He did not have any trouble in signing that codicil or paper.

343 xQ. He did not?

A. No, sir, not that paper.

344 xQ. Do I understand you to say that he was perfectly rational at that time?

A. He was competent.

345 xQ. Yes?

A. On the 11th, that is.

346 xQ. That is right, on the 11th?

F. 1656 A. Yes, sir.

347 xQ. Doctor, are you the physician for Mr. Reynolds' family now?

Mr. Blaikie: Same objections.

A. Yes, sir.

348 xQ. The physician for Mrs. Reynolds?

Mr. Blaikie: Same objections.

A. I think so, generally attend her.

349 xQ. And Mr. Reynolds?

Mr. Blaikie: Same objections.

A. Yes, sir.

350 xQ. And you have been since the marriage of Mr. and Mrs. Reynolds?

A. I do not know; they may have been elsewhere.

351 xQ. If they have you have not known it?

Mr. Blaikie: Same objections.

A. No, have not known it.

(At this point at the request of Mr. Sherman, the entire cross-examination was read by the stenographer.)

352 xQ. Were you in the Surrogate's Court
F. 1557 when Dr. Wilcox gave his testimony?

A. Yes, sir.

353 xQ. You heard his testimony, did you?

A. Not all of it.

Mr. Bovee: That is all.

Re-direct examination by Mr. Sherman:

354 RDQ. Were Mr. Fayerweather's eyes open during all of the time of your visit on the morning of the day he died?

Mr. Bovee: We object to it as not proper re-examination, the witness having already been examined on the subject in chief.

F. 1558 A. I think they were.

355 RDQ. Did he say anything as to the deferring of the signing of this paper until the Monday?

A. I do not quite understand it.

356 RDQ. On the morning visit which you made to Mr. Fayerweather on the morning of November 15th, the day he died, you went into the bedroom, did you not with Mr. Vaughan and spoke in his presence, in Mr. Fayerweather's presence, about signing some paper?

A. Was that the morning of the 15th?

357 RDQ. Yes.

A. Mr. Vaughan was not in the bedroom with me on the morning of the 15th. Mr. Vaughan was in the front room.

358 RDQ. After you had spoken to Mr. Vaughan on that Saturday morning you went back again into the bedroom with Mrs. Reynolds, the lady who is now Mrs. Reynolds?

Mr. Bovee: Defendants object to question as not redirect examination and as improper in assuming something which has not been proven, and irrele-
F. 1559 vant and immaterial to the issues presented upon the special pleas.

(At the request of the witness, question No. 358 was repeated by stenographer.)

A. I do not recollect going back with Mrs. Reynolds in the bedroom.

359 RDQ. Do you remember what was said about the paper that Mr. Vaughan spoke of having executed?

Mr. Bovee: Same objection.

A. That was in the front room.

360 RDQ. Yes. Was the fact communicated
F. 1660 to Mr. Fayerweather that there was paper to be signed after that?

Mr. Bovee: We object to the question as improper in form and leading, irrelevant and immaterial to the issues presented upon the special pleas, incompetent and calling for a conclusion and not a fact.

(At the request of the witness, question No. 360 was repeated by stenographer.)

A. Not that I know of. I got my information

from Miss Joyce and Mr. Vaughan that I was to be a witness to a paper on the 15th.

361 RDQ. Dr. Vedder, are you, yourself, a little hard of hearing?

A. Yes, sir.

362 RDQ. How long had Mr. Fayerweather looked to you for medical advice before his death?

Mr. Bovee: We object to it upon the ground that the witness has already been twice interrogated and answered it.

F. 1661

(At the request of the witness Question No. 362 was repeated by the stenographer.)

A. I have been his medical attendant for fifteen years.

363 RDQ. Were you at that time as now accustomed to shave your mouth clean, that is you wore no mustache or beard but only side whiskers?

Mr. Bovee: We object to it as irrelevant and immaterial to any possible or conceivable issue in Fayerweather against Ritch.

A. Yes, sir.

364 RDQ. And Mr. Fayerweather could see the

F. 1662 motion of your lips when you spoke to him?

A. He could, yes, sir.

365 RDQ. Had you any knowledge of his being hard of hearing?

A. My impression is that he was a little hard of hearing.

366 RDQ. Have you any recollection as to whether his eyesight was impaired?

A. It was impaired.

367 RDQ. Did you ever see hm reading anything within the six months before his death?

Mr. Bovee: We object to it as not re-examination of the witness upon any matters as to which he has been al-

ready interrogated in chief, irrelevant and immaterial to the issues presented upon the special pleas, and incompetent and a violation of Section 834 of the Code of Civil Procedure.

A. Yes.

368 RDQ. Did you ever see him read a newspaper or a book during that time?

A. I think I have seen him read within six months before his death.

369 RDQ. A newspaper or a book?

F. 1663 A. A newspaper particularly.

370 RDQ. Well, will you describe how he held the newspaper and what aids if any he had to reading at that time?

Mr. Bovee: Same objection as before.

A. Well, he had to use a magnifying glass.

371 RDQ. First, how did he hold a newspaper, did he hold it near his eyes or far off?

A. I do not remember that, I know he used to occasionally use a magnifying glass, one that I gave him.

372 RDQ. Was it a magnifying glass of high power?

A. Yes, sir.

373 RDQ. And did he also use spectacles?

A. Yes, sir, besides.

F. 1664 374 RDQ. Were the spectacles of high power?

A. I do not know.

375 RDR. Did you ever notice whether the lenses were very convex or the reverse?

A. No, sir.

376 RDQ. This occasion, when you say he signed his name to Mr. Butler's codicil, do you say he used the lens?

A. I do not think he used the lens. He had considerable difficulty in signing it, but I do not think he used the lens.

Mr. Bovee: We move to strike out the words, "he had considerable difficulty in signing it."

377 RDQ. Did he have any difficulty in putting his name to the paper prepared by Mr. Butler on the 11th of November, 1890.

Mr. Bovee: We object to the question, the witness having already testified that he did not have any difficulty in signing his name; we object to the question as irrelevant and immaterial to the issues presented upon the special pleas, and incompetent in calling for the opinion of the witness and not for a fact.

F. 1665 (At the request of the witness, question No. 377 was repeated by stenographer.)

A. I do not think he did.

378 RDQ. What do you mean by saying that he had considerable difficulty in signing it?

Mr. Bovee: We object to the question as incompetent and to the matter as irrelevant and immaterial to the issues presented by the special pleas, the witness having been fully interrogated upon the subject and given his answer.

F. 1666 (At the request of the witness, question No. 378 was repeated by stenographer.)

A. That is on the 11th?

379 RDQ. Yes.

Mr. Bovee: We further object to the question as the witness has already said that he did not have difficulty in signing it.

(Question 378 repeated by stenographer.)

A. I do not recollect saying that.

380 RDQ. I think you have said on your cross examin-

ation that you went from Mr. Fayerweather's room into the back room, what do you mean by the back room?

A. On the second floor there is a front room and a back room; the back room was his bedroom?

A. Yes, sir.

382 RDQ. Well, when you left his bedroom you could not go into any back room from there, could you?

A. No, sir. The front room was his library or sitting room, and the back room was his bedroom.

F. 1667 383 RDQ. Do you mean by anything that you have testified to upon your cross-examination to change any statement made by you at the time of my examination of you in chief?

Mr. Bovee: Counsel for the defendants objects to the question as improper in form and leading, and calling for a conclusion of the witness as to testimony already given by him and manifestly improper and not a proper re-direct examination of the witness.

(At the request of the witness, question No. 383 was repeated by stenographer.)

A. Do you mean to-day?

F. 1668 Mr. Bovee: No, at all times, doctor, to-day and two years ago, that is what it means.

Mr. Sherman: No intimidation, if you please. I do not want this gentleman to define my question. If you will hear the question read, that is the sense in which I want it answered.

(Question 383 repeated by stenographer.)

The Witness: The only amendment that I could make would be in the sense of being called before Judge Truax, I am not satisfied with that, that has

gone out of my mind and I have been trying to recall it.

384 RDQ. But otherwise do you mean to change in your testimony given in this room to-day anything that you have testified to when you were in this room last in this case?

Mr. Bovee: We make the same objection to this question. The testimony will speak for itself, and the witness cannot testify as to what his intention was, what the effect of his testimony was. It is mani-

F. 1669 festly improper and incompetent.

A. No, I do not know of anything.

385 RDQ. Doctor, do you remember distinctly that at any time on the 15th of November, Mr. Fayerweather responded to you in any uttered speech or whether he merely nodded?

Mr. Bovee: We object to the question as improper upon re-direct examination of the witness. The witness has already been examined upon the same subject in chief fully, and we object as irrelevant and immaterial to the issues presented upon the special pleas, and incompetent, and calling for the conclusion of the witness and not for facts.

F. 1670 (At the request of the witness, question No. 385 was repeated by stenographer.)

A. Well, as I have said before his answers were simply yes or no or a nod, I don't remember of his uttering any sentence.

Mr. Sherman: I think that is all.

Re-cross examination by Mr. Bovee:

386 RXQ. Doctor, did anybody tell you on the 15th of

November that you would be wanted as a subscribing witness to a paper to be signed by Mr. Fayerweather?

A. Yes, sir.

387 RXQ. Who told you that?

A. Mr. Vaughan and Miss Joyce.

388 RXQ. When you say Miss Joyce, do you mean the lady who is now Mrs. Reynolds?

A. Yes, sir, who was then Miss Joyce, Miss Amelia Joyce.

389 RXQ. You knew her then as an inmate of
F. 1671 Mr. Fayerweather's family?

A. Yes, sir.

390 RXQ. And she had been for the fifteen years that you were her physician?

A. Yes, sir.

391 RXQ. You had confidence in that lady, did you not? A. I did.

392 RXQ. What else did she say to you when she told you that, doctor, upon that subject?

A. How is that?

393 RXQ. What else did she say upon that subject upon that occasion to you?

A. Only that she informed me that I was to be there at four o'clock to witness a paper with
F. 1672 Dr. Wilcox.

394 RXQ. Did she say what the paper was to be? A. No, sir.

395 RXQ. You understood it was a paper to be signed and executed by Daniel B. Fayerweather?

A. Yes, sir.

396 RXQ. Was Dr. Wilcox present?

A. No, sir.

397 RXQ. What time in the day was it that Miss Joyce told you that? A. At noon.

398 RXQ. Was Mr. Vaughan present?

A. Oh, yes, sir.

399 RXQ. Anybody else?

A. No one that I remember.

400 RXQ. Was Mrs. Fayerweather?

A. I think not.

401 RXQ. You are not sure.

A. No.

402 RXQ. She may have been?

A. I do not remember of her being there.

403 RXQ. Doctor Wilcox was not present?

A. No, sir.

404 RXQ. What time did you say that the
F. 1673 appointment was made for the execution of that paper?

A. Four o'clock.

405 RXQ. Were you at your office at four o'clock?

A. Half past three.

406 RXQ. And remained until four?

A. No, my servant informed me that I was not required.

407 RXQ. You returned to your office at half past three, did you?

A. Yes, sir.

408 RXQ. In the expectation of going to Mr. Fayerweather's house at four o'clock?

A. Yes, sir.

F. 1674 409 RXQ. To meet this appointment?

A. And Dr. Wilcox was at his office.

410 RXQ. At the same time?

A. At the same time, yes, sir.

411 RXQ. You were both there expecting to go to the Fayerweather house at four o'clock?

A. Yes, sir.

412 RXQ. To act as witnesses to this paper to be executed by Mr. Fayerweather?

A. Yes, sir.

413 RXQ. You did not go?

A. It was countermanded.

Mr. Bovee: That is all.

Mr. Sherman: That is all.

MAUS R. VEDDER.

Sworn to before me January 21, 1902.

JOHN A SHIELDS,
Examiner.

F. 1675

COMPLAINANTS' PROOFS.

NEW YORK, February 15th, 1901.

Met pursuant to adjournment.

F. 1676 Present: The Examiner, Mr. Sherman, Mr. Blaikie, Mr. Parsons, Mr. Bovee, Mr. Carnochan, Mr. McLaughlin, a representative of Messrs. Root, Howard, Winthrop & Stimson, a representative of Nash & Jones and a representative of Russell & Holmes.

ALLAN McLANE HAMILTON, called as a witness on behalf of the complainants, being duly sworn, testified as follows:

Direct examination by Mr. Sherman:

1 Q. Give your full name and address?

TESTIMONY OF A. M. HAMILTON.

A. Allan McLane Hamilton, 44 East 29th street, this city.

2 Q. What is your profession? A. Physician.

3 Q. How long have you been a licensed physician?

A. Nearly thirty years.

4 Q. Practicing where during that time?

A. In this city and in London.

5 Q. Have you been the author of standard works upon legal medicine and upon kindred topics?

A. I have, sir.

F. 1677 6 Q. Will you enumerate the books you have written?

A. Well, I have written a small book on medical jurisprudence, a larger book in two volumes, one volume you have before you there; I have written a treatise on nervous diseases, and I have written a number of articles for journals and societies.

7 Q. Do you know whether your book on medical jurisprudence is a text book in any colleges or law schools?

I believe it is.

8 Q. Do you recall in what ones?

A. Well, I do not know that it is mentioned in any of the catalogues, I know that it is gen-

F. 1678 erally used both in this country and in England.

9 Q. Have you made a specialty of any particular topic of what might be called legal medicine?

A. I have of mental diseases. I am at present the professor of mental diseases in Cornell University Medical College.

10 Q. Have you occupied any other positions of that character?

A. Yes.

11 Q. As a lecturer or professor?

A. I delivered some lectures at the College of Physicians and Surgeons in this city.

12 Q. Upon what subject?

A. Upon medical jurisprudence, and I have at different times delivered lectures at other colleges. I have delivered lectures and given instruction at the Manhattan State Hospital, with which I am connected.

13 Q. Have you frequently been called as an expert witness in courts?

A. I have, sir, by the United States Government, I was a member of the special commission appointed by the government in the Schneider case; I have been called by the district attorneys in different
F. 1679 parts of the state, and by lawyers, in several cases in other states.

14 Q. Have you had occasion to give testimony in respect to the probate of wills?

A. I have.

15 Do you recall any such cases?

A. Well, I have been retained and given advice or been on the stand in the Richardson will, I have been associated with Mr. Root in the Jesse Hoyt will, I have been in the Berrian will—it is very hard to remember—I have been in a great many many cases during the last twenty-five years.

16 Q. The book to which you referred entitled "A System of Legal Medicine" by Allan McLane Ham-
F. 1680 ilton, the latest edition of that book was published when?

A. The latest edition was published two or three years ago.

17 Q. And was there an edition in 1894?

A. There was.

18 Q. In discussing the subject of legal medicine in that book, did you in the second volume at page 116 discuss the topic of "Wills Made in Extremis."

A. I did write a paragraph on that subject.

19 Q. Is the paragraph therein set forth a sound deduction in your opinion from experience and your knowledge as an expert?

Mr. Bovee: We object to the question as incompetent, calling for the opinion of the witness on a written paper not in evidence, irrelevant and immaterial to the issues presented on the special pleas, as incompetent, calling for the opinion of the witness upon a matter not material or in any way related to the issues in this case.

(At the request of the witness, question No. 19 was repeated by stenographer.)

F. 1681

A. I intended it to be.

20 Q. And do you believe it to be?

Mr. Bovee: Same objections.

A. Yes.

Mr. Sherman: I read it in evidence.

Mr. Bovee: Counsel for defendants objects on the ground that the matter is irrelevant and immaterial to the issues presented upon the special pleas, irrelevant and immaterial to any possible issue in the case, incompetent as evidence in the case, as giving the opinion and conclusion of the witness and not any fact relevant to the issues in this case.

Mr. Sherman (reading):

F. 1682 "WILLS MADE IN EXTREMIS."

"Wills made in Extremis usually have no value in the eye of the law, and these, as well as contracts, are often contested.

"Tardieu, Lasegue, and other French writers have extensively written upon the mental condition of the individual during the last moments of life. They announce their belief that either as a result of general disease or insanity the brain is always affected just before death, and intelligence obscured to some extent, so that the capacity for will making is at least

doubtful. There certainly can be no question as to the mental weakness that occurs when pulmonary decarbonization fails, and the brain is supplied with vitiated blood; and there can be no doubt that just before death there must be a dissolution and incoordination of concept arrangement. The instances of hallucinatory disorders that are gravely presented in good faith by credulous people as death bed utterances and prophecies are numerous and, after
F. 1683 all, significant indications of disorganization.

It therefore cannot be denied that the last hours of life are frequently attended by mental obscuration or perversion, even when such does not appear to be the case to outsiders; and a person with some assistance may be helped to sign and apparently understand a will. Some diseases, when the cause of death is toxæmia or great exhaustion, must sometimes interfere with the clear exercise of judgment. An aged man whose will was lately the subject of contest, died after a week's illness, the nature of which was strangulated hernia and peritonitis. Shortly before death he was made to sign a will, notwithstanding the fact that soon after
F. 1684 he was so delirious that it required the efforts of several men to hold him down, and he presented the signs of collapse; yet he was pronounced by the consulting physician in his case to be of sound mind.

"For obvious reasons it is impossible to fix a limit of time before death when a will should be rejected. Of course the particular circumstances should be determined and weighed. In a condition symptomatized by mental indecision due to weakness, especially where semi-consciousness is present, the assertion that testamentary capacity exists should be received with

some hesitation; and where the person's condition is such that he has to be supported and a pen held in his hand—the aid not being alone required because of existing paralysis—I think we cannot be too careful in sifting to the bottom the testimony that may be admitted."

F. 1685 21 Q. Doctor, what is understood by physicians when the expression "pulmonary decarbonization is used?

Mr. Bovee: Defendants object upon the ground that the question is irrelevant and immaterial to the issues presented upon the special pleas and incompetent.

A. It seems that in health the lungs have the power of removing the carbonic oxide from the blood through the inhalation of oxygen, the air enters the lungs and purifies and decarbonizes the blood, and in diseases where there is asphyxia where the the vital powers are lowered in some way or another, this process is interfered with; the chemical pro-
F. 1686 cess is stopped and there is a poisoning of the system inconsequence.

22 Q. What effect upon the brain power has the poisoning of the system by that means?

Mr. Bovee: Same objection.

A. The mental processes are interfered with. There is a weakness of mind which is more or less intense in relation to the extent of the poisoning, and the inability of the individual to concentrate his attention or to use his natural functions properly.

23 Q. What is meant by the expression "inco-ordination of concept arrangement"?

Mr. Bovee: Same objection.

A. It is the regulation of ideas in the mind.

24 Q. When there is an inco-ordination of concept arrangement, what condition of the mental power and the brain function does that describe?

Mr. Bovee: Same objection.

A. It describes an inability to regulate and join together properly ideas to form thought.

25 Q. And is co-ordination of concept arrangement essential to the normal and proper exercise of the mental functions and powers?

Mr. Bovee: Same objection.

F. 1687 A. It is.

26 Q. In the case of the patient who dies of consumption after four or five years' illness, what is the general rule as to whether pulmonary decarbonization fails?

Mr. Bovee: Same objection.

A. I believe that it does fail by reason that the breathing space is encroached upon by the deposits, by the consumption.

27 And as the lungs are encroached upon and the breathing space is diminished what relative change if any follows in the capacity of the patient to use his brain in a normal or rational manner?

F. 1688 Mr. Bovee: Same objection.

A. Well, that is veriable, it depends entirely upon the amount of trouble; very often they have towards the end of life a species of mental derangements and delusions.

28 Q. Does the encroachmeut upon the lungs by the progress of consumption have a progressive tendency to the brain with vitiated blood?

A. I think it does.

29 Q. Suppose a man dying at 68 years of age, as the result of consumption, which has existed say four years prior to his death, and who has been in active business and who ceases to attend actively to business about

eighteen months before his death; just to fix the relations of the years one to the other, suppose his death to have occurred on the 15th of November, 1890; suppose that on the evening of November 14th, 1890, a woman who had previously been treating him with massage movements, coming to his residence for that purpose, finds that his extremities are cold up to the knee and that he presents to her eyes, she being a layman, the appearance of a marked change from the day before, creating in her mind the impression that he is dying;

suppose his attending physician on the morn-
F. 1689 ing of the 15th, about eleven o'clock, upon calling in his usual professional attendance, notices that his extremities were becoming cold, that his mind as well as his body was impaired, that the coldness of his extremities, his respiration, his heart movement and his general appearance indicated to the physician at that time that he was dying, that the physician on that occasion found that the patient's heart was not sufficiently strong to propel the blood to his extremities and and that in consequence thereof his extremities were cold that his respiration was then rapid and shallow and not sufficient to oxygenate the blood in conse-

quence of which his color was inclined to blue,
F. 1690 that his kidneys had ceased action and he could not pass water, that his physician had stopped all medicine and food and gave directions to give him only water, and that about eleven o'clock on the same night he died, his death being immediately preceded by these symptoms, that is that the extremities were cold, that his respiration was very rapid and shallow, that his pulse was rapid and very weak, that there were rales in the lungs and in the throat, that his color was cyanic or blue and that towards the last he began to breathe irregularly his heart fluttered, and finally he had the death rattle and the death shudder and then died; in that case can you form

an opinion, and express it, as to whether in the morning of November 15, 1890, and following the physician's visit on that morning, there would have been in that patient such a mental and physical condition as would enable him intelligently to comprehend the disposition by will of a large and important part of his property?

Mr. Bovee: Counsel for the defendants object to question on the ground that it assumes facts which have not been proven, irrelevant and imma-
F. 1691 terial to the issues presented upon the special pleas, incompetent and hypothetical.

Mr. Parsons: And furthermore that it asks the witness to express an opinion predicated not upon facts, but what is stated to have been the observation of a masseurist, who is described as a layman, and of some doctor, without any reference whether the masseurist or doctor were competent or incompetent to draw deductions from what they claim to have seen.

A. I can only answer that by saying I believe that the man's vital powers were so lowered by some disease that produced weakness that I do not believe that his brain could have acted with its
F. 1692 ordinary vigor. I would like to have more facts in regard to the mental condition before I give a more extended answer.

30 Q. Suppose, in addition to the conditions embodied in the last question, the patient had been so weak as to be confined to his bed for forty-eight hours, having previously for about a month been confined to the house and moved about when he was taken out of bed in a wheel chair on the floor of the house, upon which floor his bedroom was; suppose on the 15th of November he had not been able to swallow from a time prior to the arrival of the physician in the morning, that he

had been unable to speak in sentences or otherwise than by yes or no or by nodding his head; suppose he had been so weak during the twenty-four hours preceding the physician's visit that morning as to be unable to raise himself up in bed without assistance, and that it required the aid of others to raise him and prop him up with pillows; suppose that in the night of the 14th of November, 1890, his attendant had been required to throw open the window of his room to enable him to get his breath; would a man suffering from that
F. 1693 disease and under the described conditions be able to comprehend the nature of a transaction which I will describe as follows. On the 11th of November, 1890, the patient had executed a codicil to his will in order to change his testamentary arrangements, as the result of a conviction produced on his mind by a person whom had free access to him that a person whom his previous testamentary arrangements had given a very large control over his estate, amounting to $6,000,000 or thereabouts, had designed and planned, under fair appearance of regularity in his testamentary papers to secure to that person the practical control of the disposition of that estate, the patient had acquiesced in that control upon the conviction
F. 1694 or belief that the power thereby conferred would be used to carry out the wishes of the patient in regard to his estate, which was inconsistent with the statutes and which to be carried out required an evasion of the statutes; the patient was persuaded by these other persons who as I say had free access to him, that under this testamentary plan previously existing there wa. the design on the part of the person who drew the papers to divert the property to his own uses in some form or another, that condition of things produced a feeling of repugnance and antipathy on the part of the patient towards this designing person which led to the execution of this codicil on the 11th of

November to displace him altogether from any connection with the patient's testamentary affairs—to be a little more specific, the scheme referred to was to be carried out under the guise of a devise of the residuary estate to certain men named as his executors or two or three named as his executors for the purpose of enabling them to dispose of the residuary estate to certain institutions against the prohibition which existed under the circumstances against giving more than half of his property to those institutions and the codicil of November 11th swept
F. 1695 away the scheme of a residuary estate and re-instated an original will made in 1884, by which the residuary estate was to go directly by the plain terms of the will to the institutions in question; the excitement and strain incident to this change of opinion concerning the lawyer, the gentleman who got up this plan to be carried out, and incident to his displacing of him in relation to the patient's estate, I will ask you to assume had a marked injurious and depressing effect upon the condition of the patient; previously to that the professional opinion of his attending physician was that he would live until March, but as shown by the statement made he died on the 15th of November; assume that having made
F. 1696 this change that testamentary arrangement by the codicil of November 11, 1890, he gave instructions to the gentleman under whose advice he displaced the other, and I may for the sake of clearness add that the gentleman who constructed this plan is a Mr. Ritch and the one persuaded Mr. Fayerweather to displace Mr. Ritch was a Mr. Vaughan, suppose that Mr. Vaughan on the morning of November 15th received from Mr. Fayerweather instructions for a new codicil involving somewhat detailed arrangements respecting his estate, embodying the placing of a new codicil including other institutions and various other dispositions of minor importance to others, suppose that Mr.

Vaughan leaves the house upon the statement of the physician that this patient may die at any time, will probably die that day, and after two or three hours' absence comes back to the house with a codicil which does not allude to the instructions of the morning, nor to any item of the instructions of the morning, and consists merely and only in reinstating the residuary clause to the executors, in undoing what had been done by the codicil of November 11th, and changing the condition of
F. 1697 things as they existed before the codicil of November 11th only by placing Mr. Vaughan in the same category with the other two as a residuary legatee equally with the others; and suppose this codicil to be signed, if it were signed by this patient about two o'clock on November 15th, 1890; upon that assumption I ask for your opinion whether the patient could have understood the nature and effect of his act in putting his name to that codicil of November 15th, 1890?

Mr. Parsons: We repeat the objections which were taken to the preceding question, or to so much of this question as precedes this addition; and we add this objection. Many of the assumptions of the question as now put assume a high degree of mental force
F. 1698 and intelligence and others point the other way, and we object to have put to the witness a question which requires an answer to these contradictory hypothesis, and submit that it is for the witness to determine which of them he regards as material.

Mr. Sherman: The counsel for the complainants protests against the course of the counsel for the defendants in undertaking under guise of taking objection to the question to endeavor to anticipate and mitigate the force of the answer which apparently the counsel assumes.

A. I believe that, from the medical symptoms alone, which are the only ones I have a right to

pass upon, that this man was unable to exercise his normal mental functions from the time—from 11 o'clock we will say that morning until the time he died; for the reason that a condition of vital depression and a loss of bodily vigor which brought with it the symptom of inability to swallow, taken with the other things, in my mind presupposes a condition of extremis, and in giving this answer I put out all the previous questions at all, the previous parts of the question. I believe that from 11 o'clock—I fix that as the time after the doctor's visit—until the time of his death he did not possess mental vigor to perform a normal
F. 1699 act, for the reason that his power of attention, his power of mental concentration, his exercise of judgment and reason, were in my opinion, affected by the toxæmia that existed, and other weakness.

31 Q. Do you believe that a man in that condition would be able to act intelligently in deciding whether or not to sign a paper making the radical change which I have stated in the previous question, at two o'clock on the day of his death?

Mr. Parsons: Same objections.

A. I have already answered; I do not believe a man would be able to exercise any free will
F. 1700 or perform an understanding act.

Mr. Sherman: I think you may cross-examine

Mr. Bovee: The defendant Hamilton College, while standing upon all of the objections taken to the testimony of the witness, Dr. Hamilton, declines to cross-examine said witness, on the ground that his testimony is entirely irrelevant and immaterial to any of the issues raised by its plea to the cross bill; and furthermore moves to strike out the the whole of said testimony upon that ground. On behalf of the defendant filing the pleas and as to whom this examination is made, excepting the defendant Hamilton College, counsel for the defendants protests against being compelled to cross

examine upon matters which are irrelevant to the issues raised by the special pleas; and in cross examining the witness said defendants do not waive their objection that such matter is irrelevant and immaterial. They make a cross examination and insist that it is in the nature of a *de bene esse* examination, conditioned on the Court holding that the direct examination of the witness is relevant and material and before proceeding with the cross examination defendants repeat the tender of the stipulation to strip the case of all irrele-

F. 1701 vant matter, meaning by that matter which is irrelevant to the only issue which they understand to be before the Court, that of estoppel by the judgment in Amherst College and others against Ritch which they have pleaded in bar and before proceeding with the cross-examination defendants move upon the record to strike out all of the testimony of the witness as irrelevant and immaterial to the issues raised upon the special pleas.

Mr. Sherman: Counsel for the complainants does not acquiesce in the limitation sought to be placed by counsel for the defendants upon their cross-examination.

F. 1702 Cross-examination by Mr. Parsons:

32 xQ. When you have the opportunity of seeing a person can you form an accurate opinion of the physical and mental condition of that person?

A. Sometimes.

33 XQ. And sometimes not?

A. Sometimes not.

34 XQ. When you have no such opportunity, then, for any opinion which you express or judgment which you entertain, are you dependent upon the assumptions which you are required to accept for giving your reason?

A. Naturally.

35 XQ. Is there any difficulty in putting before you assumptions which necessarily lead to an opinion that the condition of the patient is not normal?

A. Yes, there is difficulty if they are inconsistent; it depends entirely upon the consistency of the symptoms.

36 XQ. Is there any difficulty in phrasing a question to you, the assumptions of which are consistent?

A. There is not if he knows enough to do it.

F. 1703 36 XQ. And on the other hand if the person knows enough how to do it, is there any difficulty in putting before you a series of assumptions which lead as a result to your opinion and judgment that the condition of the patient is normal?

A. There is not if they are consistent.

38 XQ. So that when your judgment is asked and your opinion is sought in respect of a patient about whose physical and mental condition you know nothing, is it purely a question of how the assumptions of the question put to you are framed?

A. It is purely a question of evidence.

39 XQ. Do you testify upon the idea that assumptions are evidences?

F. 1704 A. If assumptions are true, consequently they are evidence to my mind.

40. XQ. Suppose they are not true?

A. Well then if they are inconsistent I give an answer in accordance.

41 XQ. But suppose they are both inconsistent and untrue, what then?

A. I give answer according to my judgment.

42 XQ. Or in other words you disregard the hypothesis?

A. No, I do not. Take the hypothesis and give an answer that I can consistent with my information and education.

43 YQ. If the hypothesis leads in one direction you testify accordingly, and if in the other direction you testify accordingly?

A. If the bulk of the elements of the hypothetical question convince me that I can give the answer one way I give it. If I do not find evidence I decline to answer it or express my inability to do so.

44 XQ. Suppose the hypotheses point the other way?

A. I should admit it.

F. 1705 45 XQ. And you would testify the other way?

A. What do you mean? If a hypothetical question is put to me which contains irrational elements I hope I am honest enough to give an answer which is proper under the circumstances. Is your question that I would answer either way no matter how the question is put?

46 XQ. Just the reverse, doctor. My question asks whether your answer depends upon the assumptions of the question?

A. Yes, it depends upon the assumptions of the question, whether they are true or false.

47 XQ. If they point to mental incapacity you

F. 1706 testify to mental incapacity?

Mr. Sherman: One moment! I object on the ground that under the guise of the cross-examination of this witness upon matters testified to by him in chief, the cousel is endeavoring to elucidate the obvious proposition of law perfectly known to the Court before whom this record is to go that the value of the hypothesis depends upon the establishment by independent evidence of the truth of the hypothesis with which the witness who is under examination is not concerned, so that his opinion can be accorded no value or effect unless independent of the facts entering into the hypothesis; and for these

reasons the pretended cross-examination is no cross-examination but is evidence at large in the cause and overrules the plea and is otherwise incompetent, immaterial and irrelevant.

(At the request of the witness question No. 47 was repeated by stenographer).

A. Yes.

48 XQ. And if they point the other way you
F. 1707 testify to a different result?

A. I would.

49 XQ. In the passage from "A System of Legal Medicine by Allan McLane Hamilton and others," Vol. II, which I understand to have been put in evidence upon your direct examination, there is this statement—

Mr. Sherman: That is the edition of 1894.

49 XQ. (Continuing): "In a condition symptomatized by mental indecision due to weakness, especially where semi-consciousness is present, the assertion that testamentary capacity exists should be received with some hesitation." In using that phrase were you guarded in in the language which you used?

A. It speaks for itself.

F. 1708 50 XQ. Were you not very careful in adopting the exact phraseology?

A. Yes, I am careful all through the book. I qualify that further on, I think; I give the reason for the hesitancy.

51 XQ. Yes, you say further on "And where the person's condition is such that he has to be supported and a pen held in his hand—the aid not being alone required because of existing paralysis—I think we cannot be too careful in sifting to the bottom the testimony that may be admitted."

A. Yes.

52. XQ. In using that additional language, were you

guarded and careful in the phraseology in which you expressed your opinion?

A. Evidently. I meant to be conservative and not to exaggerate one way or the other.

53 XQ. So that it goes just as far as you thought it was safe and prudent to go and no further?

A. Yes, sir.

54 Q. That is to say the assertion that testamentary capacity exists should be received with some hesitation?

A. Yes, sir, with some care.

F. 1709 55 XQ. Of course, that is a very different thing from denying it altogether?

A. Yes.

Mr. Parsons: That is all.

Mr. Sherman: No further questions.

Signed.

ALLEN McLANE HAMILTON.

Signed and sworn to before me this 18th day of February, 1901.

F. 1710 JOHN A. SHIELDS,

Examiner.

Continuation of the cross-examination of *EMMA S. FAYERWEATHER.*

By Mr. Parsons:

503 xQ. Miss Fayerweather have you fixed the date when you were in the Surrogate's Court during the probate contest?

A. No, sir.

504 xQ. How nearly can you fix the date?

A. I do not think I can fix it all.

505 xQ. Can you fix the month?

A. It must have been January or February.

506 xQ. Is there any circumstance which you have in mind by which you can approximate the date?

A. I cannot recall any.

507 xQ. Whom did you see in the Court room whom you learned to know by name or did know by

F. 1711 name?

A. I do not think I could say I have seen anyone, I would not feel that I could correctly say that I remember any of them.

508 xQ. Did you not see Judge Rollins there?

A. Certainly I have seen them all, but I would not know any of them if they would come into the room today.

509 xQ. That is what I intended to inquire about. What I wish to have you state is who were there, who were pointed out by name at the time or who at the time you knew.

A. Why it must have been Judge Rollins and Mr. Coudert.

F. 1712 510 XQ. Were they having it all to themselves or were there lawyers on the other side?

A. There were other lawyers of course.

511 XQ. Can't you give the name of any of them?

A. I could not directly from my remembrance.

512 XQ. Were not any of them pointed out to you by name?

A. I do not recall such.

513 XQ. As I understand Miss Lizzie Joyce was being examined as a witness on the day you were there?

A. Yes, sir.

514 XQ. Did you hear the testimony of any other witness given?

A. Yes, sir.

515 XQ. What other witness?

A. I do not remember the name.

516 xQ. Can you remember whether the other witness or witnesses were witnesses to either of the testamentary papers, the will or the codicil?

A. Yes, sir.

517 xQ. Can you remember whether Governor Woodford was examined while you was there?

A. I could not say positive to anyone but
F. 1713 Miss Joyce?

A. That is all I would feel like saying positive about.

518 xQ. How many witnesses were on the stand on the occasion that you were there?

A. I do not think more than two besides Miss Joyce.

520 ?Q. Were you there more than one day?

A. I think I was there a short time on the second day, not a full day.

521 xQ. Did you hear arguments made by Mr. Coudert or Judge Rollins or the lawyers on the other side?

A. I cannot recall hearing any of them.

522 xQ. You heard questions put by them,
F. 1714 did you not?

A. I suppose I did, of course.

523 xQ. I want to see whether I can aid your memory so as to have you state as matter of memory that you heard testimony given, that you heard questions asked and that you heard discussion on the part of the lawyers?

A. Well, of course, I heard them speak those things but I paid no attention to it myself; I did not realize you know that I knew anything about the matter, and I simply left it in the hands of the parties who were taking care of the matter for me.

524 xQ. And they were who?

A. Mr. Beardsley.

525 xQ. And what lawyer?

A. And of course Mr. Rollins.

526 xQ. When did you see Mr. Fayerweather last before his death?

A. Three or four years before he died.

527 xQ. Did you at any time while the probate contest was going on know what objections to the probate of Mr. Fayerweather's will were interposed in your name and in the name of your sister, Mrs. Achter?

A. I do not think I did.

Mr. Sherman: That is objected to on the ground that it calls for a communication by the witness to
F. 1715 her legal adviser and is therefore privileged upon which ground I advise the witness to decline to answer.

528 xQ. Did you give any authority, I mean any personal authority, for particular objections to be made to Mr. Fayerweather's wills and codicils in your name?

The witness: On advice of counsel I decline to answer.

529 xQ. Who is the counsel to whom you refer?

A. Mr. Sherman.

Mr. Sherman: Wait a minute, please?

530 XQ. Who is the counsel to whom you refer in the assumption that authority given by you was given to counsel?

Mr. Sherman: Objected to on the ground that the very form of the question objected to involves a statement of communication to counsel in the na-
F. 1716 ture of things, and that the present form of inquiry comes within the privilege quite as much as the former; upon which ground I advise the witness to decline to answer.

The Witness: On the advice of counsel I decline to answer.

531 xQ. Do you mean Judge Rollins?

Mr. Sherman: Same objection and same advice.

The Witness: On advice of counsel I decline to answer.

532 xQ. Was Judge Beardsley, in that he did at that time, acting as your attorney in fact and under a written power of Attorney?

Mr. Sherman: Objected to on the ground that it appearing that Judge Beardsley has acted as a counsellor at law in and about the premises the inquiry comes within the same privilege, upon which ground I advise the witness to decline to answer.

The Witness: On advice of counsel I decline to answer.

533 xQ. Do you mean in declining to answer about Judge Beardsley to admit that Judge Beardsley, in respect of what he did at that time for you, was
F. 1717 acting as lawyer?

(At the request of the witness question 533 was repeated by stenographer.)

Mr. Sherman: I object to the question on the ground that it is a mere evasion of the substance of the objection, and substantially violates the privilege upon which ground I advise the witness to decline to answer.

The Witness: Upon the advice of counsel I decline to answer.

534 XQ. When were you in New York next
F. 1718 before the occasion when you were in the Surrogate's Court? A. Three or four years.

535 XQ. So that any communication between you and any person in New York in respect of this probate contest prior to the time when you were here present was in writing? A. Yes, sir.

536 xQ. Were you here when Mr. Reynolds was examined as a witness in this very suit before Mr. Shields, as Examiner?

A. One day.

537 xQ. Did you hear him questioned about a passage from an argument made before the Surrogate on February 18, 1891, which passage reads, "Now what

are the circumstances here? We have a testator, a business man, a prosperous man with growing wealth, apparently not a man himself of very much education, but perhaps for that reason all the more anxious to link his name with the great institutions of the land, and to enable men in his own, commencing life as he did, in a humble way, to get the benefit of learning. That was in his mind many years; he meant that the bulk of his estate should go to institutions of learning, and we have in evidence to-day that
F. 1719 he never faltered in it and that he never gave up the pet cherished scheme of his life."

Mr. Sherman: Objected to on the ground that the inquiry is immaterial and irrelevant, that the right of the complainant to maintain this action and the grounds upon which she seeks to maintain it cannot be affected in any legal way, either by the fact she was present when Mr. Reynolds was asked this question, or by any matter embodied in the question.

A. I think that question was asked the day I was here.

538 XQ. And did you hear the answer which Mr. Reynolds gave?

F. 1720 Mr. Sherman: Same objection.

A. Yes, sir.

539 XQ. Have you ever spontaneously—I mean by spontaneously uninfluenced by anybody else—had any wish to defeat what Mr. Coudert stated to have been "the cherished pet scheme" of the life of Mr. Fayerweather, about which he never faltered?

Mr. Sherman: Objected to on the ground that by the policy of the Statutes of the State of New York the right of a testator to devise and dispose of his property is subject to limitations, founded in settled public policy, that the Statute highly regards the ties of blood and makes it imperative in cases where a testator seeks to defy a pub-

lic policy and the Statute, and by the aid of counsel learned in the law to defraud and defeat the Statute in its policy, that the right of blood kin shall nevertheless be respected and enforced, even contrary to his intention, in which predicament these defendants now stand, and this complainant's right to pursue this action and to maintain and sustain it is not dependent in any wise upon the opinion of Mr. Coudert as to the motives which actuated Mr. Fayerweather in making such testamentary dispositions as he did in fact make, especially in

F. 1721 view of the fact that in the present condition of the record it appears that under color and pretext of carrying out supposed desires of Mr. Fayerweather, the defendants have engaged in criminal conspiracy to procure the probate of fraudulent documents as his will; upon all which grounds I insist that the inquiry is wholly hypothetical, calls for the mental operation of the witness, calls for her intentions which are legally expressed already in the form of her pleading in this cause, and the position taken by her counsel upon the progress of it to this time; and therefore I advise the witness to decline to answer.

The Witness: Upon the advice of counsel I decline to answer.

F. 1722 540 xQ. Are you willing to stand upon this record, either by your testimony or by declining to give testimony, as charging on the part of your uncle, the late Mr. Fayerweather, a purpose which, to use the language of Mr. Sherman, was characterized as fraudulent?

Mr. Sherman: Objected to on the ground that what the witness is willing to do in any relation to this case is to be determined by her pleadings, by the evidence which she has adduced, and by the contentions of her counsel; and that it is wholly inadmissible for counsel so seriously affected by the character of her claim and the evidence adduced in support of it to undertake in this method to volunteer and interpose between

her counsel and herself respecting the conduct of this cause or her mental attitude towards it; on the ground further that the inquiry is wholly impertinent and illegal; upon which grounds I advise the witness not to answer.

The Witness: Under advice of counsel I decline to answer.

541 xQ. Have you known, until by these questions and these objections your attention is called to it, that your name is being used and that you are being
F. 1723 used for the purpose of putting upon your deceased uncle the late Daniel B. Fayerweather, the imputation that he was guilty of fraudulent conduct, and furthermore, for the purpose of an attempted defeat of what was the cherished pet scheme of his life?

Mr. Sherman: Objected to on the ground that the hypothesis of the question is wholly unfounded in this evidence, that it rests upon fraudulent and forged documents and pretences, that the inquiry does not relate to any matter inquired of in chief, and is wholly illegal and impertinent; upon which grounds I advise the witness to decline to answer.

The witness: Upon advice of counsel I de-
F. 1724 cline to answer.

542 xQ. When first did you know what were the legacies which Mr. Fayerweather's will left to you and to your sister, Mr. Achter?

A. Shortly after his death.

543 xQ. How did you receive, and how, if you know, did your sister, Mrs. Achter, receive the settlement money, the money that went to you and Mrs. Achter by way of settlement?

Mr. Sherman: Objected to on the ground that the assumption in the question of settlement is in conflict with the entire and established proof in this case.

A. I cannot recall directly, I think a New York draft.

544 xQ. Sent to you by whom?

Mr. Sherman: Same objection.

A. Mr. Beardsley.

545 xQ. Do you remember the amount?

A. Do you mean to myself or to Mrs. Achter?

546 xQ. State it both ways?

A. $30,000 to myself and $30,000 to my sister.

F. 1725 547 xQ. Have you now in your possession any of the letters of that period, whether written by Judge Beardsley or by Judge Rollins?

Mr. Sherman: Objected to on the ground that the inquiry violates the privilege of counsel, of attorney and client, upon which ground I advise the witness to decline to answer.

The Witness: Upon advice of counsel I decline to answer.

Mr. Parsons: The counsel for the defense most earnestly remonstrate against such a declination, against the invitation by Mr. Sherman to the witness to make such declination, in view of the fact that upon her direct testimony she was asked about the contents of a letter stated by her to have been received from

F. 1726 Judge Beardsley, which contents, as testified to by her, she gave in answer to questions put to her by the gentleman who now takes these objections.

Mr. Sherman: Counsel for complainants protests against the misstatements made by counsel for defendant's, but pays no further attention to it.

Mr. Parsons: I said Judge Beardsley; change it to Judge Rollins instead of Judge Beardsley.

Mr. Sherman: No, do not change it at all.

Mr. Parsons: Leave it as it is. The letter to which the counsel for the defense referred and which was incorrectly stated to be from Judge Beardsley was

a letter from Judge Rollins, and they make the same remonstrance in view of the course adopted by counsel with respect to that letter, that is to say putting in evidence the contents of a letter not produced, and then upon further inquiry in reference to it instructing the witness to decline to answer about it.

Mr. Sherman: Counsel for the complainants renews his protest against the misstatements made in the last statement by the counsel for the defendants.

548 XQ. I ask you separately, first in ref-
F. 1727 erence to Judge Beardsley, have you in your possession any letters of that period? I mean the period of the settlement, written to you by Judge Beardsley?

Mr. Sherman: Objected to on the ground that the witness has testified respecting one letter from Judge Beardsley that it is not in her possession, that it was destroyed ten years ago, and has therefore fully answered the question as regards that letter and upon the ground further that the inquiry about other letters is violative of the privilege of attorney and client and is not opened by the reference to the destroyed letter; upon which grounds I advise the witness to decline to answer.

The Witness: On advice of counsel I decline
F. 1728 to answer.

Mr. Parsons: Counsel for the defense again remonstrate against the course pursued by Mr. Sherman in that it makes impossible to cross examine upon a letter and the contents of a letter as to which he himself has examined the witness.

549 xQ. Have you in your possession any letters of that period written by Judge Rollins?

Mr. Sherman: I give the same advice for the same reasons.

The Witness: Upon the advice of counsel I decline to answer.

550 XQ. Did you in or about March, 1891, receive from

Mr. Beardsley a letter in which he gave you certain advice?

Mr. Sherman: Objected to on the ground that the question is not confined to the letter of which the witness has spoken in chief, and therefore violates the privilege of attorney and client, upon which ground I advise the witness to decline to answer, stating, however, that if questions are asked by the counsel relating to the letter as to which the witness has been interrogated in chief I shall not make the ob-

F. 1729 jection.

The Witness: Under the advice of counsel I decline to answer.

551 xQ. Although you decline to answer the preceding question, which asks about advice given to you, do you recall that upon that very subject you were examined by Mr. Sherman?

(At the request of the witness question 551 was repeated by stenographer.)

A. Yes, I think I was.

552 xQ. Do you think that you ought to decline to answer the question which I now to put to

F. 1730 you?

Mr. Sherman: Objected to on the ground that the witness having adopted the advice of counsel, it is no proper part of the function of opposing counsel to endeavor to dissuade her to disregard it, and that the inquiry in view of the position taken by her counsel and herself is impertinent, upon which grounds I advise her to decline to answer.

The Witness: Upon the advice of counsel I decline to answer.

553 XQ. Miss Fayerweather is it distinctly in your mind at the present time as a matter of memory that the advice letter to which you testified in answer to Mr.

Sherman was destroyed, or do you only draw that as an inference from the fact that you cannot remember now where it is or what became of it?

A. Why I feel very sure that it was destroyed.

554 XQ. What makes you feel very sure?

A. The fact that Mr. Beardsley was my brother-in-law and I trusted everything to him, and when it was done we destroyed the papers, I did not keep any papers, I did not suppose there would ever be any necessity of showing them.

F. 1731 555 XQ. And how long did you remain in that condition of mind? Or perhaps I can refresh your recollection. Was it until Mr. John B. Reynolds put himself in communication?

A. Well, I guess it was.

556 XQ. Miss Fayerweather have you such a recollection of that letter as to recall that it was upon paper containing any printed address and print for a date?

A. I do not know that I understand your question, Mr. Parsons.

557 XQ. Have you not often seen letters—

Mr. Sherman: Don't they call them letter heads?

558 xQ. Have you not often seen letters at the top of which was printed the name of the firm to

F. 1732 which the writer belonged and the statement of the address of the person a blank being left to fill in the date?

Mr. Sherman: Objected to as immaterial.

A. I have no recollection what kind of paper it was written on.

559 xQ. Whether it was upon letter head paper or not?

A. No, I could not testify to that.

560 xQ. Can you testify whether it bore the evidence of having been letter press copied?

A. No, I could not.

561 xQ. Have you any distinct recollection at the present time of the contents of that letter?

A. I have of part of it.

562 xQ. If you were to see a letter press copy, to which would you attach the more importance, the letter press copy or your remembrance?

Mr. Sherman; Objected to as purely speculative and hypothetical and illegal, upon which ground I advise the witness to decline to answer.

The Witness: Upon the advise of counsel I decline to answer.

563 xQ. When did you first tell anybody, and
F. 1733 who was it to when you made the statement that there ever was such a letter?

Mr. Sherman: Objected to on the ground that the inquiry violates the privilege of attorney and client, upon which ground I advise the witness to decline to answer.

The Witness: On advice of counsel I decline to answer.

564 xQ. Did you ever read the printed copy of the proceedings before the Surrogate on the probate contest?

A. No, sir.

565 xQ. Did you ever read any part of it?

A. No, sir.

566 xQ. Do you know or have you ever heard
F. 1734 that on October 6, 1884, your uncle, the late Daniel B. Fayerweather, wrote a letter in these words: "New York, October 6, 1884. This certifies that I have executed my will of this date, having been advised by my counsel of the provisions and restrictions of the law of this state relative to benevolent corporations. I trust my heirs will permit the provisions of this my will to be carried into effect. D. B. Fayerweather."

Mr. Sherman: Objected to as not cross-examination and as evidence in chief in the cause, following other evidence in chief in the cause which was deliberately put upon the record by these defendants against the objec-

tion and protest of the complainant's counsel, whereupon the complainants insist and will insist that the defendants have overruled their pleas and have opened the matters at large in the cause.

A. No, sir.

567 XQ. Are you one of the persons referred to in the expression in this letter "my heirs"—"I trust my heirs"?

A. Yes, sir.

568 XQ. When first did there ever come to
F. 1735 you, if there ever came to you, a purpose that you would disregard that trust in yourself and Mr. Fayerweather's other heirs which he expressed in that letter?

Mr. Sherman: Objected to on the ground that it appears from the testimony that this letter was concocted by one Thomas G. Ritch, one of the defendants herein, under the pretence of satisfying Mr. Fayerweather that if he should make a will giving Thomas G. Ritch practical control over his whole estate, and making Mr. Ritch residuary legatee with a discretion which would enable him to throw the specific devises into the residuary clause, that he would find a way to make it feasible to make a disposition of Mr. Fayerweather's estate
F. 1736 which Mr. Fayerweather at one time designed, and Mr. Ritch then determined that it should not be carried out; that therefore no trust which required to be respected was created by the paper inquired about, nor had it any tendency to create any trust which ought to be respected, and that the trust thus asserted in the question having been condemned as illegal and a fraud upon the statutes in the judgment which the defendants have introduced in evidence by way of estoppel, it is not now open for them to contradict their plea, their judgment and their proof by this inquiry; and the inquiry is wholly illegal

and impertinent; upon which grounds I advise the witness to decline to answer.

The witness: Upon the advice of counsel I decline to answer.

569 XQ. Miss Fayerweather are you aware that in the bill of complaint in this suit which purports to be verified by you as far back as July 17, 1897, you state under oath that your uncle, the late Daniel B. Fayerweather, did execute a writing, of which I have read to you a copy, which bears date October 6, 1884, and
F. 1737 as to which you have recently testified this morning that down to now you never knew of it nor were informed about it?

Mr. Sherman: Objected to on the ground that the question is misleading, that it states the complaint untruly, that it states the oath untruly, and that it states the previous testimony of the witness untruly, and I advise the witness that she is not obliged to answer the question which contains such an array of untruths, and for that reason I advise her to decline to answer.

The Witness: On the advice of counsel I decline to answer.

F. 1738 570 xQ. Are you satisfied to remain upon this record in the position of having in a bill of complaint, apparently verified by you, sworn to one thing and upon your examination sworn to the reverse?

Mr. Sherman: Objected to upon the ground that the assumption of the question is wholly false and unfounded, and I advise the witness that she is not bound to answer such questions.

The Witness: Upon the advice of counsel I decline to answer.

571 XQ. Miss Fayerweather, I ask of you as a lady to state to the Court frankly whether the responsibility for the position in which you are placed by your testi-

mony and by this suit is due to action on your own part, or whether the responsibility is not entirely that of Mr. John B. Reynolds who is using you and your name for his own purposes, and in ways of which you do not know and have not been informed?

Mr. Sherman: Objected to upon the ground that the question is obviously upon its face impossible to be answered, inasmuch as it is impossible for her truthfully to say whether Mr. Reynolds has been acting in ways of which she has not been informed, inasmuch
F. 1739 as the absence of any information on her part necessarily involves a negative that she knows the matter which she does not know; also upon the ground that the inquiry is unfounded and without any foundation in the testimony, and is impertinent, insulting, improper and illegal; upon which grounds I advise the witness to decline to answer.

The Witness: Under advice of counsel I decline to answer.

572 XQ. Did you in or about the month of January, 1900, receive a letter from Messrs. Parsons, Shepard & Ogden inquiring whether you had authorized the commencement of a suit which alleged a conspi-
F. 1740 racy, etc.?

(At the request of the witness, question No. 572 was repeated by stenographer.)

Mr. Sherman: You can answer that.

A. No, I did not.

573 xQ. Have you never received such a letter.

A. No, sir, I have not.

574 xQ. (Handing paper.) Look at the letter which I now hand you, a copy letter which I now hand you, and tell me whether there ever came to you a letter to that purport?

Mr. Sherman: Let me see it before you answer. I ask to have the letter marked for identification.

(Paper was marked "Complainants' Exhibit, No. 1, for identification, February 15, 1901, C. B.)

A. No, sir, it did not come to me.

575 Q. Did such a letter so far as you know or were informed come to Mrs. Achter?

Mr. Sherman: Objected to as immaterial on the

F. 1741 ground that the writing of any such letter, if any such were written, is a crime, that it is in violation of the Penal Code and of the Statutes of the United States inasmuch as the attempt to intimidate or influence the parties to a pending action by threats is a crime, on the ground that it is evidence at large in this case, that it has no relation to any of the issues in this case, and that it is obviously brought to the attention of this witness at this time for the purpose of and in pursuance of a clear plan observable throughout the course taken by the defendants herein to intimidate and bully and annoy the complainants.

F. 1742 (At the request of the witness, question No. 555 was repeated by stenographer.)

A. I think it did.

576 xQ. Did you see it at the time?

A. No, sir.

577 xQ. Did she ever answer to your knowledge?

Mr. Sherman: Objected to on the ground that inasmuch as the letter purports to be written by or under the authority of the examining counsel, he is obviously the best witness upon that subject; and for all the reasons previously stated.

A. I could not say.

Mr. Sherman: I ask to have that letter spread upon the record.

Mr. Parsons: If Mr. Sherman desires that it shall go into the minutes I have no objection.

Mr. Sherman: I do not ask for it, I insist upon it.

"Parsons, Shepard & Ogden,
Trinity Building,
No. 111 Broadway,
F. 1743 New York, Jan. 23, 1900.

John E. Parsons,
Davis B. Ogden,
Edward M. Shepard,
Henry B. Closson,
Herbert Parsons.

Mr. John B. Reynolds,

Sir:

There was commenced in your name as plaintiff on January 10th, 1900, a suit against John E. Parsons, Justus L. Bulkley, Henry B. Vaughan and others. The suit alleges a conspiracy on the part of the defendants by forgery of Mr. Fayerweather's
F. 1744 last codicil, etc., to deprive you of the rights alleged to belong to you. Simultaneously with the commencement of the suit publications about it appeared in the newspapers here and very generally elsewhere. We look upon the suit as in the nature of a malicious prosecution, started and made public under circumstances to cause as large damage as possible. As examination at the office of the Clerk of the Court discloses the fact that the complaint in the suit has not been verified. We take for granted that you would not dare to swear to the truth of the false and unfounded statements which the complaint contains.

"As there is nothing about the papers to show that you have authorized the suit, we write to say that unless within two weeks you, in writing, disavow to us responsibility for it, we shall assume that it was authorized by you, and the above defendants will hereafter proceed accordingly.

Yours truly,

PARSONS, SHEPARD & OGDEN.

F. 1745 C."

578 XQ. This letter refers to a suit which alleged a conspiracy on the part of the defendants by forgery of Mr. Fayerweather's last codicil, etc., to deprive the persons to whom it is addressed of the rights alleged to belong to them, it refers to the publication simultaneously of the suit in newspapers about it, it refers to the fact that the complaint in the suit is not verified and there is nothing about the papers to show that the persons to whom the letter is addressed had authorized the suit, and asks the persons to whom it is sent to either disavow responsibility or to assume authority. Did you ever hear that there was such a suit?

F. 1776

(At the request of Mr. Sherman, question 568 was repeated by stenographer).

Mr. Sherman: Objected on the ground that under guise of the question counsel seeks to introduce upon the record recitals of fact which must be established by proof, on the ground that it necessarily calls for violation of the privilege of attorney and client, on the ground that the lawful and legitimate and decent and proper mode of ascertaining whether the suit in question was authorized, was a very familiar application to the court to require the attorney to disclose the authority,

that the adoption of the course suggested or embodied in this printed letter is a manifest attempt to accomplish an unlawful, criminal and illegitimate purpose, and to intimidate, bully and obstruct the complainant in the prosecution of the pending suit, and on the further ground that this is not cross-examination of any matter inquired of in chief, upon all which grounds I advise the witness to decline to answer.

F. 1747 The Witness: Upon the advice of counsel I decline to answer.

Mr. Sherman: In reference to the objection, counsel for the complainants states that so far as the objection is addressed to the proposition that there is no evidence that any such letter existed or was sent, I will withdraw that objection if the examining counsel will declare that he ever sent such a letter.

579 xQ. Have you any knowledge upon the subject, or have you any information upon the subject of the responsibility under which you are for the use which has been made of you and your name in Fayerweather
F. 1748 litigation?

Mr. Sherman: Objected to on the ground that the question is not cross examination, and is obviously addressed to the witness in pursuance of a purpose by the examining counsel to bully, intimidate and obstruct the complainants in the prosecution of their suit, and upon the further ground that the inquiry is not cross examination, and is not relevant to any issue in the case. Read the question again.

(Question 579 repeated by stenographer.)

Mr. Sherman: And upon the further ground that it is

a gross impertinence on the part of counsel who the evidence now of record shows, withheld material and important evidence at the time of the probate, which if produced would inevitably have established that the dying day codicil of Mr. Fayerweather was not his act, to assume in the form of this question that anything in or about this case is not the lawful and righteous prosecution of a just claim by which the complainant has been must unjustly, illegally, and by most criminal practices deprived.

F. 1749

Mr. Parsons: While the counsel for the defendants do not on this occasion, and have not on other occasions felt called upon to make any response to the course of procedure of Mr. Sherman as indicated by what he calls objections such as taken to the last question, none the less they desire that the record shall show that its indecency is not overlooked by them, and they protest against it, they protest against false statements being put upon the record under the false pretence that they constitute objections to the question.

Mr. Sherman: Counsel for the complainants in reply to the last observation of counsel for the defendant says that he has placed upon the record objections

F. 1750 which are valid to the overbearing, impertinent and unfounded assumptions of the the counsel for the defendants which he addresses to witnesses apparently only for the purpose of grossly insulting them, being of sufficient experience and knowledge to be well aware that the questions are wholly improper as questions. Against such conduct it is necessary to make objections adapted to the abuse to which objection is made.

Mr. Parsons: Read that.

(Statement read by stenographer.)

580 XQ. Do you see anything insulting in my asking you whether you are aware of the responsibility under which you have been put by the use which has been made of you and your name in Fayerweather litigation?

Mr. Sherman: Objected to on the ground that the counsel has entirely lost sight of the nature of the present proceeding, of the issues to be determined and of the legitimate line of the inquiry, and inasmuch as the views of this witness as to the personal conduct of this connsel, while they may require some atten-
F. 1751 tion from the Court, are not evidence in any possible way in this cause, for which reasons I advise the witness to decline to answer.

The Witness: On the advice of counsel I decline to answer.

581 xQ. Miss Fayerweather, did you ever hear of a paper which had been called a deed of gift or the deed of gift in connection with the Fayerweather matters?

A. Yes, sir.

582 XQ. Did you hear of it when you were in New York on the occasion when you were present at the Surrogate's Court during the probate contest or about that time?

F. 1752

(At the request of the witness question 562 was repeated by stenographer).

A. I cannot recall definitely whether it was when I was here or shortly after my return to Muscatine.

583 XQ. How long was it before the settlement or before your receiving the money which came to you in settlement, a month or two?

A. Yes, sir.

584 XQ. Did you have correspondence about it with Judge Beardsley?

A. The deed of gift?

585 XQ. The deed of gift.

A. No, sir.

586 XQ. Do you remember how it came to you, if the fact be that it or information about it came to you shortly after your return from New York to Muscatine?

A. I did not answer that other correctly, I guess. I really do not know. If it was conveyed to me by letter of course I wrote back, but what they were I do not recall anything about it.

F. 1753

587 XQ. Miss Fayerweather I want to give you the opportunity of stating what is your best recollection upon the subject of how information about the deed of gift came to you, whether it came to you while you were in New York, or whether it came to you shortly after your return, and in the latter case whether it must not have come to you by letter?

Mr. Sherman: Objected to on the ground that the witness not having requested any opportunity there is no occassion for the inquiry, and that it has been already been fully answered; also on the ground that it is evidence at large in the cause and the legal effect of introducing evidence at large in the cause by

F. 1754 these defendants the complainants will now and at all time insist upon.

588 XQ. Miss Fayeweather do you desire to make any explanation or statement to relieve your testimony from the apparent inconsistency. I am willing to give you the opportunity. If you do not desire it and your counsel forbids it I am satisfied to leave it as it is.

Mr. Sherman: Objected to on the ground that there appears to be no inconsistency, that the assumption of the question is unwarranted and misleading.

Mr. Parsons: Apparently you are at liberty to answer that question.

A. I cannot recall whether it was before or after I returned.

589 xQ. Do you mean by that that it was while you were here in New York, or after you returned?

A. It was not while I was in New York; if it was at any time, it was while I was at Mrs. Beardsley's. It was not while I was in New York.

590 xQ. Ah, yes! That recalls. When I speak about your being in New York, I mean your being in and about New York at that time. Was part of

F. 1755 your visit spent with Judge Beardsley?

A. Yes, sir; part of it was spent there.

591 xQ. Well, is this then the condition of your mind about the deed of gift, that you have heard of it while you were at Judge Beardsley's house, or it may have been after your return to Muscatine?

A. Yes. I cannot to-day recall definitely which time it was.

592 xQ. But it was one or the other?

A. Yes, sir; it was one or the other.

593 xQ. It was not while you were personally present in the City of New York?

A. No, sir.

F. 1756 594 xQ. When did you first know the terms of Mrs. Fayerweather's will?

Mr. Sherman: Objected to as immaterial and incompetent.

A. I do not know as I know what the terms of her will were.

595 xQ. Have you never had any information about it?

Mr. Sherman: Same objection.

A. No, sir.

596 xQ. Not down to to-day?

A. Except what I have heard here.

597 xQ. Were you not in this room when Mr. Reynolds was examined?

A. Yes, sir.

598 xQ. About Mrs. Fayerweather's will?

A. Yes, sir.

599 xQ. Was that the first information you had?

A. Yes, sir.

600 xQ. About the contents of the will?

A. Yes, sir.

601 xQ. Did you, in connection with the settlement receive from Judge Beardsley a letter written after the deed of gift was made public, in which he in-

F. 1757 formed you that it was the wish of Mrs. Fayerweather to settle, there being made to her some pecuniary benefit under the reservation contained in the deed of gift, that she desired that you and Mrs. Achter should co-operate in the settlement, and that she promised if you would do so that out of what should come to her she would provide for the girls, meaning you and Mrs. Achter?

A. I have no recollection of anything of the kind.

602. XQ. Is that as strong a statement as you can make, that you have no such recollection?

A. Yes, sir.

F. 1758 603 XQ. When did you last see Judge Beardsley?

Mr. Sherman: Objected to as immaterial.

A. I cannot give you the date but it is since I have been in New York this time.

604 XQ. About how long ago?

Mr. Sherman: Same objection.

A. Two weeks ago anyway, if not a little longer.

605 XQ. Have you had any conversation with him at any time about what passed between him and Mrs. Fayerweather in connection with the settlement?

Mr. Sherman: Objected to as immaterial and obviously incompetent and not within the issues and not

cross-examination, hearsay, on which grounds I advise the witness to decline to answer.

The Witness: On the advice of counsel I decline to answer.

Mr. Parsons: We have nothing further to ask?

Mr. Sherman: No questions.

Signed

F. 1759 EMMA S. FAYWEATHER.

Signed and Sworn to before me this 21st day of Feb., 1901.

JOHN A SHIELDS,

Examiner.

F. 1760

Mr. Sherman: May I inquire, Mr. Parsons, whether you desire to cross-examine Mrs. Reynolds, or whether you desire to leave that to Mr. Bovee?

Mr. Parsons: Is Mrs. Reynolds to be a witness?

Mr. Sherman: Her testimony in chief has been read from the Hamilton record. I read in evidence from the Hamilton College record the deposition of Prescott Hall Butler, and in that connection I offer and read in evidence the opinion of Lacombe J., on file in this Court dated October 22nd, 1898,

TESTIMONY OF E. S. FAYERWEATHER.

(See Appendix of Exhibits No. 55—page 283).

The order thereon dated October 24, 1898,

(See Appendix of Exhibits No. 56—page 286).

The order adjudging Mr. Butler in contempt which is found at pages 234 and 255 of the original deposition of said Butler.

F. 1761 (See Appendix of Exhibits No. 57—page 287).

The order of this Court upon the mandate of the Circuit Court of Appeals made in a proceeding instituted by Prescott Hall Butler entitled Prescott Hall Butler, plaintiff in error against Emma S. Fayerweather and another, entered January 19, 1899.

(See Appendix of Exhibits No. 58 and No. 59 and 60—pages 288, 294 and 295).

Mr. Bovee: Counsel for the defendants objects to the reading of the matters indicated from the Hamilton College record upon the ground that it is unau-
F. 1762 thorized and illegal and incompetent, the witness not havingbeen produced and examined in chief before counsel for the present defendants.

Mr. Sherman: Is that all the objection?

Mr. Bovee: Of course there are other objections to be noted to the question which I shall indicate.

Mr. Sherman: The matter then appears to be with you.

Mr. Parsons: Mr. Sherman, what I am doing is trying to consent or to propose that Mrs. Reynolds' cross examination before Judge Truax be accepted as her

cross examination here, in which case I do not care to have her here.

Mr. Sherman: I have no objection to that except I want to reserve the right to re-examine her after looking over the cross examination.

Mr. Bovee: Are you going to read depositions this afternoon?

Mr. Sherman: I expect the witness Baylor here sometime this afternoon, but in the meantime I think we might get some of this formal work out of
F. 1763 the way. There is a question pending, Mr. Parsons, as to whether you wish to cross examine Mr. Carvalho?

Mr. Parsons: No, I do not care to cross-examine him.

Mr. Sherman: Mr. Bovee, you are through, I understand with Mr. Carvalho?

Mr. Bovee: I have concluded his cross examination as far I am concerned.

Mr. Parsons: Mr. Sherman, I am willing to dispense with the presence of Mrs. Reynolds if there be put upon the stenographer's minutes as her present cross examination such parts of her cross examination before Judge Truax as I shall indicate.

F. 1764 Mr. Sherman: Indicate now or hereafter.

Mr. Parsons: I think that will be all of her cross examination.

Mr. Sherman: I agree to that, with the reservation that I may re-examine her after I have examined that.

Mr. Parsons: Very well.

Mr. Sherman: And when will that be done?

Mr. Parsons: I will go down to my office and do it?

Mr. Sherman: And shall I hear from you or Mr. Bovee as to what it is without the necessity of attending for that purpose?

Mr. Parsons: Yes.

At this point a recess was taken until 2:30 P. M.

AFTER RECESS.

Mr. Sherman: Did you arrive at some conclusion with Mr. Parsons about Mrs. Reynolds cross-examination?

Mr. Bovee: Yes, I will indicate that.

Mr. Sherman: On the other hand to adopt the F. 1765 same course I will put in from the same record by way of redirect examination everything in her deposition in the Five College action that you leave out.

Mrs. Joyce-Reynolds' Direct Examination From Record of Amherst vs. Ritch.

ANNER AMELIA JOYCE-REYNOLDS, called as a witness on behalf of the plaintiffs, being duly sworn, testified as follows:

F. 1766 Direct-examination by Council for the Plaintiffs:

By Mr. Cook:

Q. Where do you reside, Mrs. Reynolds?

A. 11East Fifty-seventh street.

Q. In this city? A. In this city, yes, sir.

Q. How long have you resided there? A. Since 1876.

Q. What relation are you to Mr. Daniel B. Fayerweather? A. I am a sister of Mrs. Fayerweather.

Q. Did you live in the family during that time?

A. I lived in the family for twenty years.

Q. What was the health of Mrs. Fayerweather——

Mr. Parsons: Objected to, and the purpose of the objection is to call to the attention of the Court that this opens a line of examination as to which the question will subsequently occur whether we are entitled to cross-examine.

Mr. Cook: I will withdraw that. I was coming right to this question.

Q. You may state whether or not you acted as amanuensis for Mr. Fayerweather, and were
F. 1767 with him up to the time of his death?

A. I was, for the last two years.

Q. Were you there at the house on the 14th of November, 1890? A. Yes, sir.

Q. I show you Exhibit O, which purports to be a letter signed by Thomas G. Ritch, and addressed "My dear Miss Joyce," dated November 13, 1890; did you ever see that paper before, Miss Reynolds?

A. Yes, sir.

Q. When did you first see it?

A. On the 14th of November, about eight o'clock in the evening.

Q. 1890? A. 1890.

Q. What did you do with it?

F. 1768 A. I read it to Mr. Fayerweather.

Q. Mr. Daniel B. Fayerweather?

A. I did.

Q. I now show you a letter, dated New York, November 13, 1890, purporting to be signed Hall & Vaughan; when did you first see that letter, if you have ever seen it before?

A. That letter came by the same mail.

Q. About eight o'clock in the evening of November 14?

A. Eight o'clock in the evening of November 14, 1890.

Q. What did you do with this letter?

A. I first read it to myself and then read it to Mr. Fayerweather.

Q. Do you know in whose handwriting it is?

A. It is in Mr. Vaughan's.

Q. How soon after you received them did you read these letters to Mr. Fayerweather?

A. As soon as I read them myself, I told him that I had received those letters, and I read them.

Q. I asked when, immediately after the re-
F. 1769 ceipt of them?

A. Immediately after the receipt of them.

Q. That evening? A. That evening.

The paper and envelope referred to is marked for identification, Exhibits Q and Q*a*, for identification of this date.

See Appendix of Exhibits No. 32—page 222.

Q. When did you next see Mr. Vaughan after you had received that letter marked for identification Exhibit Q?

A. The next morning, on the morning of the 15th.

Q. Where did you see him?

F. 1770 A. As he was coming into the house; as he was entering the house I was about going out; I met him in the hall.

Q. Did he refer to this letter at that time?

A. No, sir.

Q. Did you state the hour?

A. In the morning about 10 o'clock.

Q. When you stated that Mr. Vaughan came into the house, what house did you mean, No. 11 East Fifty-seventh street?.

A. Yes.

TESTIMONY OF MRS. JOYCE-REYNOLDS.

ANNER AMELIA JOYCE-REYNOLDS, recalled by Mr. James, further testified:

Q. From what time prior to the death of Daniel B. Fayerweather were you continuously a member of his family or household, from about what time?

A. About twenty years.

Q. You were the sister of Mrs. Fayerweather?

A. Yes, sir.

F. 1771 Q. When was it that Mrs. Fayerweather became an invalid?

A. From 1876 she had her first severe illness.

Q. From that time on did she remain in an invalid condition? A. Yes, sir.

Q. Until her death? A. Yes, sir.

Q. And when was it that Mrs. Fayerweather's death occurred?

A. On the 16th of July, 1892.

Q. What was her age at the time of her death?

A. Sixty-eight years and six months.

Q. When was it that Mr. Fayerweather became an invalid?

F. 1772 A. Mr. Fayerweather had an attack of pneumonia in 1886, and from that time——

Mr. Parsons: I think your honor has held that this is immaterial when Mr. Fayerweather became an invalid.

The Court: Objection sustained.

Mr. James: We except.

Q. Prior to Mr. Fayerweather's death did you act as his amenuensis?

A. I acted for about two years.

Q. What was the condition of his eyesight during the last of his life?

The Court: Question excluded upon the ground that it has been answered before.

Exception.

Q. What was the condition of Mr. Fayerweather's hearing during the last week of his life?

A. He was quite deaf.

Q. Were you in attendance on Mr. Fayerweather during the last week of his life, and, if so, for what purpose, or in what capacity?

Objected to by Mr. Arnoux as immaterial.

F. 1773 Objection overruled. Exception.

A. I was in the capacity of nurse and attendant upon Mr. Fayerweather in every department, anything I might be called upon to do, and constantly with him.

Q. Did you spend the night with him, Friday night, November 14th? A. I did.

Q. What did you observe during that night with regard to a change in his condition?

Mr. Parsons: That we object to.

Objection sustained. Exception.

Q. What was the disease from which Mr. Fayerweather was suffering?

Objected to by Mr. Arnoux as immaterial.

Mr. Parsons: Besides, how can she know?

F. 1774 Objection sustained. Exception.

Q. What time in the morning of Saturday, November, 15th, did you go for Dr. Vedder?

A. At ten o'clock.

Q. At ten o'clock in the morning?

A. Yes, sir.

Q. How long were you gone, or about how long?

A. I should judge about twenty minutes.

Q. And when did Dr. Vedder arrive at the house?

A. Soon after eleven o'clock.

Q. Had Mr. Vaughan arrived at the house before the time you went out for Dr. Vedder?

A. I met Mr. Vaughan in the hall as I was going out.

Q. And when you came back where was Mr. Vaughan?

A. In Mr. Fayerweather's room?

Q. Were you in daily attendance upon Mrs. Fayerweather after her husband's death until her own death?

A. Why, no, I can't say that there was; I was separated from her for a few days at a time.

Q. Nearly all of that time were you with her?

A. I was.

Q. About how many days altogether were you absent from her presence?

F. 1775 A. Probably not more than two weeks in all.

Q. Put together?

A. Yes.

Q. On how many separate occasions about?

A. I should say probably three.

Q. Won't you describe Mrs. Fayerweather's condition during the winter of 1890, and from then on after her husband's death?

Objected to by Mr. Arnoux.

The Court: Are you going to contest Dr. Irwin's statement of her condition?

The Court: Objection sustained, after the statements of the counsel that they are not going ing to contest Dr. Irwin's description of Mrs.

F. 1776 Fayerweather's condition.

Mr. James excepted.

Q. What, if any, means of support had Mrs. Fayerweather during the period between her husband's death on the 15th day of November, 1890, and the payments made to her in March, 1891.

A. Simply her credit.

Q. Can you give any further statement? You say simply her credit; I don't know what that was.

A. She borrowed some money in small sums simply to pay her servants; otherwise everything she had was charged to be paid for at some day.

Q. When was *the $1,000 given by you by that memo*randum of March 22, 1889, paid to you?

Mr. Parsons: You mean the $1,000 mentioned in the memorandum?

Mr. James: Mentioned in that memorandum.

A. Directly after reading the will.

Q. Do you mean by that that it was paid in November? A. I do.

Q. Can you say about what day it was in November?

A. I should say the 19th.

F. 1777 Q. Who paid it to you?

A. Mr. Vaughan.

Q. Will you state whether Mrs. Fayerweather was supported for a time upon that money?

Mr. Parsons: Is that material? We object.

Objection sustained. Exception.

Q. Did you lend Mrs. Fayerweather any money?

Objected to by Mr. Arnoux as immaterial.

Objection sustained. Exception.

Q. Do you remember Mr. Ritch calling at the house about the 11th or 12th of December, 1890, and having a conversation in which he asked for a picture of Mr. Fayerweather for Harper's Weekly?

A. I do.

F. 1778 Q. Do you remember what occurred after the conversation about the time Mr. Ritch was leaving?

A. I remember it perfectly well.

Q. Won't you state what occurred between Mr. Ritch and Mrs. Fayerweather upon that occasion?

Mr. Arnoux: We object to it.

Mr. Ritch has made a correct statement; there was nothing more said except regarding the picture.

Q. Did you attend any of the sessions of the Surrogate's Court during the controversy over the probate of the will and codicils?

A. I did.

Q. Do you remember being present on an occasion in the last of February or 1st of March, 1891, when Dr. John A. Irwin, who was a witness here, was at the Court house? A. Yes, sir.

Q. Did you have an interview at that time with Henry B. Vaughan, a defendant here, at which Dr. Irwin was present or near by?

A. It was rather a one-sided interview.

Q. Did you meet Mr. Henry B. Vaughan?

A. I did.

F. 1779 Q. Won't you tell where it was that you met him?

A. I was standing in the room talking with Dr. Irwin at the close of the session.

Q. That was in the Surrogate's Court room?

A. Yes.

Q. And where was you standing with Dr. Irwin?

A. About the center of the room; we were just about leaving.

Q. Who else was there in the room at the time besides you and Dr. Irwin and Mr. Vaughan, if anybody?

A. No one that I know; I was not acquainted with the people that were around there; most of the people had left the Court room.

F. 1780 Q. Won't you state just what it was that occurred on that occasion?

Objected to by Mr. Arnoux as immaterial.

Mr. Parsons; We take the same objection that we did when Dr. Irwin was asked upon the same subject.

Objection overruled. Exception.

A. Mr. Vaughan approached me, touched me lightly on the arm, and said: "Miss Joyce, I would like to speak to you," and I immediately stepped one side and told him to say what he had to say. He said: "Miss Joyce, I will fight this thing as long as there is a dollar left of the Fayerweather money, and as long as I have a dollar of my own private fortune; and I want

you to tell Mrs. Fayerweather this, and I mean every word I say." I simply said, Thanks, Mr. Vaughan.

Q. Did he make any motion of the fist or hand at the time?

A. It is something I never had done to me before.

Q. Tell me what it was.

A. It was done in that way (illustrating).

Q. Shaking his fist before your face? A. Yes.

Q. What was his tone towards you, and his

F. 1781 manner?

A. He wanted me to understand that he meant what he said.

Q. That is what he said; can you say anything of his manner, whether it was gentle or placid, or excited and angry?

Objected to.

Q. Did you go home and tell Mrs. Fayerweather as he requested?

Objected to my Mr. Parsons. Objection overruled. Exception.

A. I certainly did.

Q. What did you say to Mrs. Fayerweather when you got home?

F. 1782 Objected to by Mr. Parsons. Objection overruled. Exception.

A. I said I was not going to that Court to be insulted in that way by people who should be my best friends.

The Court: That is stricken out. The question is, what did you tell Mrs. Fayerweather that Mr. Vaughan said?

A. I told her exactly what Mr. Vaughan said to me and his manner.

Q. And then made this further remark that you have already given? A. Yes.

Mr. Arnoux: That is stricken out.

Mr. James: I ask to have that put back.

Motion denied. Exception.

Q. What did Mrs. Fayerweather say?

Objected to by Mr. Arnoux as immaterial.

Objection overruled. Exception.

Mr. Nash: I wish to raise the objection that this witness is not competent to speak as to any conversation between her and Mr. Fayerweather; she is the principal beneficiary under Mrs. Fayerweather's will.

Objection overruled. Exception.

F.1783 A. Mrs. Fayerweather said that we probably had better settle this thing.

Mr. Parsons: I repeat the objection, and ask to strike out the testimony.

Motion denied. Exception.

Q. Go on and state fully what she said?

A. She said Mr. Vaughan had it in his power to as long as he chose; the best thing we could do was to settle the thing.

Q. How was Mrs. Fayerweather affected by this information that you gave her?

Objected to by Mr. Parsons. Objection sustained. Exception.

Q. State what you saw; not your opinion or

F. 1784 conclusion, but what you saw of its effect upon her?

Same objection.

Q. State just what the facts were that you saw at the time?

A. The result was that she was quite ill for several days.

Mr. Arnoux objected to that.

Q. You say she was quite ill for several days after?

A. Yes, she was.

Q. And at the time of this conversation, when you told her this and immediately following, what did you observe with reference to her manner or appearance?

Objected to by Mr. Parsons. Objection overruled. Exception.

A. I became alarmed myself—

Mr. Arnoux objected.

A. The doctor censured me for telling her; the result was bad on her nervous system.

Mr. Arnoux moved to strike out that.

Motion granted.

Q. What did you see, what facts did you observe of its effect on her nervous system?

F. 1785 A. The woman was made ill by it, in consequence of it.

Q. Was she agitated at the time?

Same objection by Mr. Parsons. Objection overruled. Exception.

A. Very much so.

Q. What did you observe as to nervous excitement?

A. That is the way that she had it?

Q. I ask you what you observed?

A. She was very much excited; I can't express it to you.

Q. You said she was sick; very sick for some time afterwards, I think you said?

A. Yes.

F. 1786 Q. How long did that prostration or sickness continue?

Mr. Arnoux: I object to the word prostration.

The Court: How long did that sickness continue?

A. She was in bed for several days after that, and the doctor was there once or twice a day; twice a day most of the time.

Q. Do you remember Mr. Morris B. Beardsley coming to the Fayerweather house in the month of December, after the 13th? A. Yes, sir, he did.

Q. I show you a letter from Thomas G. Ritch to Judge Beardsley, which has been marked in evidence as Exhibit J15, dated December 30, 1890. Can you state

whether Mr. Beardsley brought that letter to Mrs. Fayerweather's residence after the time the letter is dated?

A. Yes; I have seen that letter before.

(See Appendix of Exhibits No. 42—page 243).

Q. Did Mr. Beardsley read that letter or show it to Mrs. Fayerweather?

F. 1787 Objected to by Mr. Nash. Objection overruled. Exception.

A. He did.

Q. Which did he do; did he read it, show it to her and read it?

A. He read it to her.

Q. In your presence? A. Yes, sir.

Q. That was in December, 1890, after the 13th?

A. Yes, sir.

Q. I want to know whether Mrs. Beardsley is a sister of Mrs. Achter and Mrs. Emma S. Fayerweather or a cousin?

F. 1788 A. She is a sister.

Q. Did you ever have any conversation with Mr. Daniel B. Fayerweather about the giving of $25,000 to Mr. Henry B. Vaughan shortly before Mr. Fayerweather's death, and the purpose for which that sum was given to Mr. Vaughan?

Objected to by Mr. Arnoux as immaterial, irrelevant and incompetent. Objection sustained. Exception.

Q. Did not Mr. Fayerweather then tell you that he had given, or was about to give, $25,000 to Henry B. Vaughan to look after and protect the interest of his his wife, Mrs. Fayerweather, after his death?

Same objection by Mr. Arnoux. Objection sustained. Exception.

Q. I want to call your attention to the last day of Mr. Fayerweather's life, Saturday, November 15, 1890, and to ask you if you were with him at the time he died?

A. Not at the very moment of his death; I was taken out of the room probably three minutes before he stopped breathing.

Q. From the time that you left the room just
F. 1789 before he expired, how long, or from what time in the day, had you been continuously with him?

A. Except times when I went for the doctor in the morning, a short time between one o'clock and the reading of the codicil.

Q. You mean the codicil executed that day?

A. Yes; which I have since learned was a codicil, a paper; and twice when I left the room with Mr. Vaughan.

Q. What I want to know is this; what time in the day was that codicil, or about what time in the day was the codicil or paper which you since understood to be a codicil, executed?

F. 1790 A. I was not present.

Q. When did you go into Mr. Fayerweather's room after that codicil was executed?

A. As the young men were going out of the room downstairs.

Q. What young men do you mean?

A. Mr. Grout. I don't know the other one—Mr. Browning. Mr. Vaughan was going downstairs with them.

Q. With them? A. With them.

Q. Where were you when they came out of Mr. Fayerweather's room?

A. I was in the room that was Mrs. Fayerweather's,

which connects with Mr. Fayerweather's by a bath-room.

Q. On the same floor? A. On the same floor.

Q. Did you go into Mr. Fayerweather's room immediately upon Vaughan and Grout and Browning leaving it?

A. I did; I went in as they were going downstairs.

Q. And who was there when you went in besides Mr. Fayerweather, if anybody?

A. Mrs. Fayerweather.

F. 1791 Q. Now when did Mr. Vaughan come back to the room; did you remain in the room from the time you entered on that occasion?

A. I did.

Q. How soon after did Mr. Vaughan come back?

A. I don't remember; Mr. Vaughan did not come into the room for more than an hour after that.

Q. Did you remain in the room from that time all that while that Mr. Vaughan was there?

A. I remained with him continuously until Mr. Vaughan asked me to leave the room with him.

Q. And then you went with Mr. Vaughan, did you?

A. Yes, sir.

Q. And did you return to Mr. Fayerweather's

F. 1792 room with Mr. Vaughan?

A. I returned, and Mr. Vaughan did not come immediately, but followed soon after.

Q. Then you got back first to Mr. Fayerweather's room? A. I did.

Q. And afterwards Mr. Vaughan came? A. Yes.

Q. And from that time did you remain continuously in the room until three or four minutes before Mr. Fayerweather's death?

A. No; I went with Mr. Vaughan at seven o'clock to the dining-room and staid possibly five minutes.

Q. And then you returned to Mr. Fayerweather's

room, leaving Mr. Vaughan in the dining-room.

A. Yes.

Q. Did Mr. Vaughan return again after that to Mr. Fayerweather's room before his death?

A. He came in while he was breathing his last.

Q. And you were there at the time? A. I was.

Q. Then, if I understand you right—and I want this to be perfectly clear—from the time the witnesses went out after the execution of the codicil on that day until within three or four minutes of Mr. Fayer-

F. 1793 weather's death you were continually in the room with Mr. Fayerweather except on one occasion when you went down stairs with Mr. Henry B. Vaughan and returned to Mr. Fayerweather's room before Mr. Vaughan, and on another occasion when you went down to the dining-room with Mr. Vaughan and returned to Mr. Fayerweather's room before Mr. Vaughan? A. I was.

Q. You stated that you made two absences with Mr. Vaughan from Mr. Fayerweather's room on that Saturday afternoon? A. Yes, sir.

Q. Where did you go with Mr. Vaughan on the first absence?

A. Mr. Vaughan asked me to go with him to

F. 1794 the kitchen fire and burn a paper—destroy a paper.

Q. Did you go? A. I did.

Q. Did Mr. Vaughan go with you? A. He did.

Q. Did he tell you what the paper was? A. He did not.

Q. Was it in an envelope or out of an envelope?

A. In an envelope.

Q. And when you got to the kitchen what took place?

A. Mr. Vaughan took off a lid, told me to put it in the fire, and I did.

Q. Take off a lid off what? A. Off the range.

Q. And you put the paper with the envelope on it into the fire? A. I did.

Q. At his direction? A. I did.

Q. When was the paper handed to you?

A. After Mr. Vaughan removed the lid from the range he handed me the letter which he took from his pocket.

Q. Do you remember Mr. Vaughan being at the house on Monday, November 10, 1890?

A. I could not tell you the date.

F. 1795 Q. The Monday of that week?

A. Oh, yes.

Q. And was he on that occasion with Mr. Fayerweather?

A. Yes, sir.

Q. And where were you during that time?

A. In the adjoining room.

Q. Was the door open, or the passageway open between the two rooms?

A. There was quite a long passageway; there are three doors, and they were open.

Q. Did you hear anything of what took place in the room? A. I did.

Q. Did you overhear a conversation at that time about the will and codicils?

F. 1796 A. Not sufficiently well to tell what it was.

Q. I don't ask you to tell what it was; but did you hear enough to know that it was about them?

A. Yes, sir.

Q. Now when Mr. Vaughan came out of the room did he say something to you; yes or no; did he speak to you?

A. During his time there he spoke to me several times. I was in and out of the room.

Q. Did Mr. Vaughan on that occasion say that he had made a discovery about the will and codicils, and was going to set matters straight?

Objected to by Mr. Arnoux as immaterial, irrelevant and incompetent.

The Court: How is that material?

Mr. James: It is material in connection with Mr. Vaughan's getting the will and codicils and taking them down to Mr. Ritch's office, and demanding this explanation, and getting letters and getting memoranda, and returning again to the house.

Objection sustained. Exception.

F. 1797 Q. When letters coming by mail were handed in at the Fayerweather house during the month of November, during the last days of Mr. Fayerweather's life, where were they handed in?

Objected to by Mr. Arnoux as immaterial.

Mr. James: I propose to show how it is material; if your Honor wants to know I will tell you.

The Court: My recollection of her testimony is she said when she got those letters she read them to him, but she did not say she got them at the same time.

Mr. Arnoux: I think she said she got them in the same mail, and read them to Mr. Fayerweather when she got them.

Witness: I did say that.

F. 1798 Q. How were these letters delivered to you, by whom?

A. Letters always came to the basement door; they were brought to me at the same time; I should not have said they came by the same mail; of course I could not swear to that.

Q. You mean that the servant brought the two letters and gave them to you at the same time?

A. Yes; that is, I should have said they were brought to me on Friday evening.

Q. And did you then read both those letters to Mr. Fayerweather? A. I did.

Mr. Nash: That will come under my objection as to her competency.

Objection overruled. Exception.

Q. I show you a letter which has been marked Exhibit Q, with the envelope attached to it marked Exhibit Q*a*, and ask you if that is one of the letters with the envelope which was handed to you on Friday evening, November 14, 1890, handed to you by the servant?

A. Yes.

F. 1799

AFTER RECESS.

Mr. Root: I want to put a few questions—

Continuation of the examination of *ANNER AMELIA JOYCE-REYNOLDS.*

By Mr. Root:

F. 1800

Q. Will you look at these two letters, dated November 13, 1890, signed "D. B. Fayerweather," and marked Exhibits J and K, and tell me whether you ever saw them before?

A. That (indicating Exhibit J) is in my handwriting

Q. Exhibit J is in your handwriting?

A. Yes, sir. That paper (Exhibit K) was written at the same time, but written by Mr. Vaughan. That letter (Exhibit J) was written by myself, and that (Exhibit K) letter was written at the same time, signed by Mr. Fayerweather, in my presence.

Mr. Root: They are both letters from Mr. Fayerweather to Mr. Ritch, dated November 13th.

(See Appendix of Exhibit No. 31 & 33 page 223.)

Q. Was this letter, Exhibits K, read to Mr. Fayerweather?

By the Court:

F. 1801

Q. Read to him by whom?

A. By Mr. Vaughan.

By Mr. Root:

Q. Did Mr. Fayerweather say anything to you on the morning of the 15th of November before Mr Vaughan came in regard to Mr. Vaughan's coming to see him that day. A. Yes.

Q. Please state what was said on that subject.

A. He said Mr. Vaughan had spent the day before with Mr. Ritch most of the day, and that he was coming to see him that morning, and he wished to see

F. 1802 him.

Q Was that called forth by any remark of yours to Mr. Fayerweather?

A. Yes; I said he had better not see any one at all.

Q. And he replied with what you have just said?

A. That was his reply.

Q. Mr. Vaughan has testified that on the morning of the 15th of November you offered to Mr. Fayerweather the letter from Mr. Ritch to yourself to read. Is that a fact?

A. I did not offer it to Mr. Fayerweather.

Q. What did happen then in regard to that letter, if anything?

A. I had been requested to hand it to Mr. Vaughan when he came, and I did it.

Q. Requested by whom?

A. By Mr. Fayerweather.

Q. Was that request made before or after you read the letter to Mr. Fayerweather?

A. It was made after I had read the letter.

Q. To Mr. Fayerweather?

A. To. Mr. Fayerweather.

Q. And when was the request made by Mr.
F. 1803 Fayerweather to you to hand the letter to Mr. Vaughan, on the morning of the 15th?

A. No; it was requested on the evening after reading it.

Q. Mrs. Reynolds, I hand you the letter signed "Hall & Vaughan," dated November 13th, addressed to Miss Joyce, and marked Exhibit Q for identification. I think you have testified that you received that letter from Mr. Vaughan. Did you read that letter to Mr. Fayerweather?

A. I did.

Q. When did you read it to him?

A. Friday evening.

Mr. Root: I offer it now.

F. 1804

The letter referred to is marked in evidence Exhibit Q of this date.

(See Appendix of Exhibits No. 32 page 222.)

Q. Mrs. Reynolds, Mr. Vaughan has testified that after the execution of the codicil by Mr. Fayerweather on the 15th of November, and after he went downstairs with Messrs. Grout and Browning and had returned to Mr. Fayerweather's room, Mr. Fayerweather said to him "that we were to put our heads together and find other places for the money," and he has testified that after the

execution of the codicil and Messrs. Grout and Browning had gone, Mr. Fayerweather said to him "put our heads together and find places to put the money." Did Mr. Fayerweather make any such remark toM r. Vaughan on that occassion?

Mr. Parsons: In her hearing, I suppose she may be asked?

Mr. Root: I will put it first "in her hearing."

A. Shall I answer the question?

Q. Yes. A. No, he did not.

F. 1805 Q. I think you have testified in answer to Colonel James that there never was a time after Mr. Vaughan went down stairs with Messrs. Grout and Browning up to the time of Mr. Fayerweather's death, that he was with Mr. Fayerweather except in your presence?

A. I say that.

Q. That is the fact?

A. I believe it to be true.

Q. Was there any conversation between Mr. Fayerweather and Mr. Vaughan after the execution of that codicil and before Mr. Fayerweather's death which you did not hear?

Mr. Arnoux: Objected to. How could she
F. 1806 tell.

Objection overruled. Exception.

A. I heard no conversation excepting one.

Q. Was there any conversation between them after the codicil was executed and before Mr. Fayerweather's death which you did not hear?

A. No.

Q. You have testified, if I understand it correctly, that you went out of the room twice with Mr. Vaughan after the execution of the codicil?

A. Yes, sir.

Q. The first time was to go down to the kitchen and

burn the paper; the second time was to go down to the dining-room? A. Yes.

Q. At what time was it that you went to the dining-room?

A. At seven o'clock in the evening, or thereabouts.

Q. And I think you have said that Mr. Vaughan did not after that return to Mr. Fayerweather's room until just the time he was dying; that is so?

A. That is so.

Q. Now, between the execution of the codicil
F. 1807 and your going to the dining-room at seven o'clock in thevening, where were you with reference to Mr. Fayerweather?

A. I was in close attendance upon Mr. Fayerweather, for he was constantly failing.

Q. And you were by his bedside?

A. I was by his bedside constantly.

Q. He was in bed? A. Decidedly.

Q. Did you leave his bedside at all during any time when Mr. Vaughan was in the room?

A. I did not.

Q. State what Mr. Fayerweather's condition was during that period—his physical condition?

Objected to as immaterial and irrelevant. Ob-
F. 1808 jection overruled. Exceptions.

A. Mr. Fayerweather, not to my knowledge, opened his eyes or spoke one word after that codicil was executed until about five o'clock, or about half-past five in the evening.

Q. And what did he say then?

A. He asked me what Mr. Vaughan was doing in the room. Shall I tell the whole?

Q. Yes.

A. I said he was coming this way, and came in to see how you were. He said: "That is not so; Mr. Vaughan heard I was dying to-day, and that is what he is here for. Mr. Vaughan, go out of the room."

(In making the last remark the witness waved her hand from her outwards and upwards).

Q. Did Mr. Fayerweather wave his hand as you did?

A. Waved his hand; said "Mr. Vaughan, go out of the room;" he was perfectly able to move his hand.

Q. Did Mr. Vaughan say anything?

A. He said, "I will go, Mr. Fayerweather."

Q. And did he go? A. He did.

Q. Did he return to the room again?

A. Not until Mr. Fayerweather died, or just
F. 1809 before he died.

Q. And by just before he died, you mean——

A. Well, perhaps might have been ten minutes before his death.

Q. Was there any conversation between Mr. Vaughan and Mr. Fayerweather between the time of your return to Mr. Fayerweather's room, after the execution of the codicil when you passed Mr. Vaughan going downstairs with the witnesses, and Mr. Fayerweather sending Mr. Vaughan out of the room?

A. That was the only word spoken by Mr. Fayerweather after I entered the room, while he lived, to any one.

Q During that period, how did Mr. Fayer-
F. 1810 weather respond to such things as we said to him?

A. Simply by a nod of ths head.

Q. What was his physical condition; was he breathing naturally or heavily?

A. His trouble was difficulty of breathing, difficulty of speech; he was too weak.

Q. Did he breathe heavily?

A. Gasping and breathing with great difficulty. It was an effort for him to speak.

Q. Mr. Vaughan has testified, or some testimony has been given here, to indicate that when you went down to burn the paper with Mr. Vaughan, that was pursuant to

some direction or assent on the part of Mr. Fayerweather?

A. Simply by the nod of the head.

Q. Won't you tell what was said to him and how he responded?

A. Mr. Vaughan asked Mr. Fayerweather if he wanted that paper destroyed, showing the paper. He replied by, simply nodding the head, but he did not open his eyes. He then asked him if he wished Miss Joyce to destroy it; the same answer, a nod
F. 1811 of the head.

Q. And not a word was said?

A. Not one word was said.

Q. Was any word said by Mr. Vaughan to Mr. Fayerweather during the period regarding which you have been testifying, that is, between your return to the room after the execution of the codicil and Mr. Vaughan's leaving the room pursuant to Mr. Fayerweather's direction, except what you have now testified to?

A. A. I heard no other words. I never knew that Mr. Fayerweather spoke.

Q. My question is did Mr. Vaughan say anything else to Mr. Fayerweather during that time?

F. 1812 A. Not in my hearing.

Q. And you were there by the bedside all the time?

A. I was there.

Mr. Parsons: This is not a complete answer.

The Witness: I was at the bedside with Mr. Fayerweather continually.

Mr. Parsons: All the time is the question.

The Witness: Well, all the time; every moment.

Q. Were you present at the interview between Mr. Vaughan and Dr. Vedder, between 11 and 12 o'clock in the forenoon of the 15th of November, just after Mr. Vaughan's interview with Mr. Fayerweather?

A. I asked Dr. Vedder to tell Mr. Vaughan Mr. Fayerweather's condition, and went with him to the sitting room where Mr. Vaughan was.

Q. What information did Dr. Vedder communicate to Mr. Vaughan?

A. He told him that Mr. Fayerweather would probnot live through the day.

Q. Did he tell Mr. Vaughan or say anything about the execution of any papers?

A. Mr. Vaughan said there was a paper that
F. 1813 must be executed. He (Dr. Vedder) said: "Then it must be done at once, or to-day."

Q. Did he say anything about its being cruel to have a paper executed?

A. Well, he did make some objections, because the doctor objected, in his condition, to signing papers; the doctor objected to his signing the paper.

Mr. Parsons: It seems to me that this does not come within your Honor's permission, and I desire to have it stricken out. I did not hear the question, or I should have objected to it.

Motion granted.

F. 1814

Exceptions by Mr. Root and Mr. James.

Mr. Bovee: The defendant Hamilton College while standing upon all the objections taken to the testimony of the witness, Anner Amelia Reynolds, decline to cross-examine said witness upon the ground that her testimony is entirely irrelevant and immaterial to any of the issues raised by its plea to the cross bill; and furthermore moves to strike out all of said testimony upon that ground.

TESTIMONY OF MRS. JOYCE-REYNOLDS.

Counsel for the defendants to this proceeding other than the defendant Hamilton College, will proceed with the cross-examination of the witness Mrs. Reynolds. They do so under protest against being compelled to cross-examine on matters which are irrelevant to the issues raised by the special pleas. In cross-examining the witness they do not waive their objection that such matter is irrelevant and immaterial. They make cross-exami-
F. 1815 ation and insist that it is in the nature of a *de bene esse* examination conditioned on the Court holding that the direct examination is relevant and material and before proceeding with the cross-examination they repeat the tender of the stipulation to strip the case of all irrelevent matter meaning by that matter which is irrelevant to the only issue which they understand to be before the Court, that of estoppel by the judgment in the case of Amherst College and others against Ritch which they have pleaded in bar. And before proceeding with the cross-examination the defendants move upon the record to strike out all the testimony of the witness as irrelevant and
F. 1816 immaterial.

Mr. Sherman: Counsel for the complainants inquires whether the counsel for the defendants withdraw or move to strike out any evidence adduced by said defendants otherwise than as a result of the stipulation which they have just tendered.

Mr. Bovee: Counsel for the defendants do not consider it necessary to answer the inquiry of the counsel for the complainants in respect to those matters. He has made his tender and it stands upon the record for just what it means.

Mr. Sherman: Counsel for the complainants responds to the tender, under the circumstances, that the de-

fendants, having voluntarily adduced evidence which is by any possible application relevant to the issues at large in the cause and not to the plea of *res adjudicata* and persisting in retaining such evidence upon the record, the said defendants have placed all questions in the cause at large, have overruled their pleas, and have by overruling their pleas placed the matters which they allege to have been adjudicated by the Five College record at large and free from any estoppel by judgment, and therefore decline
F. 1817 to enter into the vague and one-sided stipulation tendered. The complainants do not acquiesce in any limitation by the defendants of the legal effect of their cross-examination.

Mr. Bovee: It is stipulated on behalf of the complainants and the defendants, excepting the defendant Hamilton College, that the cross-examination of the witness Anner Amelia Reynolds in the case of Amherst College against Ritch, contained in that record in evidence may be read in evidence here as the cross-examination of the defendant Anner Amelia Reynolds with the same force and effect as if the witness were present and testified in answer to the questions there propounded. The parts of
F. 1818 the testimony contained in the record in evidence and introduced by the defendants as cross-examination are as follows: Beginning with and including the words "I knew that Mrs. Fayerweather had made a will" in folio 2829 on page 703 and continuing down to the bottom of the page, all of pages 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, all of page 717 except what was said by Mr. James and Mr. Parsons after the first question near the top of the page, all pages 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, and down to the words "Re-direct examination by Mr. James" on page 728.

Mr. Sherman: The stipulation is understood to in-

clude the right of the complainants by way of re-direct examination to read the remainder of the testimony of the witness into this record and to supplement it if necessary by an oral re-direct examination. I do not think that will be necessary but I cannot tell until I look it over.

Mr. Bovee: Yes, subject to the right of the defendants of course to make such objections to questions in the examination as they are advised are proper.

Mr. Sherman: That is all right.

F. 1819

Quotations from Five College Record ("Amherst vs. Ritch") beginning on page 703, ending on page 728, being cross-examination of *ANNER A. REYNOLDS.*

"A. I knew that Mrs. Fayerweather had made a will, but I did not know it until after my marriage.

Q. Until after your marriage, is that what you said?

A. Yes, some months after.

F. 1820 Q. Did you know of Mrs. Fayerweather's purpose to make that will?

A. I did not.

Q. Do you know who Mr. Robert J. Smack is?

A. I think he is—I should think he was in Mr. Coudert's office.

Q. A clerk for Mr. Coudert?

A. A clerk for Mr. Coudert. At the time of the Surrogate's trial I think he was at our house.

Q. When did you become acquainted with Mr. Daniel J. Holden?

A. I cannot tell you the date, but it was just a few days before or about the time that the Surrogate's trial commenced.

Q. And did you become acquainted with him as a member of the firm of Coudert Brothers?

A. I did.

Q. And from that time on were you in the frequent habit of seeing Mr. Holden?

A. Not often.

Q. Occasionally? A. Occasionally.

F. 1821 Q. Did he from time to time call at the Fayerweather mansion?

A. He did at the time of the trial?

Q. Were there any other papers executed by Mrs. Fayerweather about the time of the execution of this will?

A. There were some papers executed, but I do not know anythiug about the date of them?

Q. Was one of those papers a deed from Mrs. Fayerweather to you? A. Yes, it was.

Q. Of what?

A. Of the house 11th East Fifty-seventh street and the stable.

F. 1822 Q. Was that deed prepared about the time that the will was prepared?

A. I have never seen the date of it; I couldn't say.

Q. Do you associate the two facts in your mind—the execution of the will and its preparation, and the execution of the deed and its preparation?

A. No, I have not associated them in my mind because I do not know. I would not be positive about the date. I knew there was such a paper in existence.

Q. This deed to you? A. Yes.

Q. Had the deed not been in your possession?

A It was in Mrs. Fayerweather's possession up to the time of her death.

Q. Where was it?

A. I could not say; she had a safe deposit box; I do not know where it was; my husband could answer that.

F. 1823 Q. Prior to Mrs. Fayerweather's death did the key to that box come in possession of yourself or your husband, Mr. Reynolds?

A. That I could not say; it was not in my possession, ever.

Q. Did you never go to it?

A. I never did.

Q. Did you ever send Mr. Reynolds?

A. I had no power at all to send Mr. Reynolds there; Mrs. Fayerweather attended to her own business.

Q. Did she attend to her own business down to her death?

F. 1824 A. Certainly she did.

Q. Do you wish to be understood that you did not see the deed to you of the house in Fifty-seventh street and of the stable at the time that the deed was executed?

A. I say I knew there was such a paper executed, but I cannot tell you the date of it, or whether it was near the time of the will, because I know nothing about the the date of the will.

Q. I desire to fix, as nearly as I may, the time of the execution of that deed. State your best recollection about the time when that deed was executed?

A. I cannot tell you; it was before my marriage, but I cannot tell you the date.

Q. Can you approximate the length of time before your marriage—was it weeks or months?

A. I couldn't tell you whether it was a month or week or two weeks.

Q. Somewhere in that neighborhood?

A. It was not very long before.

Q. Were any other papers executed by Mrs. Fayerweather about that time?

F. 1825 A. That I do not know.

Q. Was there not at some time executed by her a power of attorney to your husband, Mr. Reynolds?

A. There was, but when that was done I do not know.

Q. Can you tell whether that was before or after your marriage?

A. It was after my marriage.

Q. How shortly after?

A. I cannot answer the question, for I was not present.

Q. How shortly after your marriage did you
F. 1826 know that there was such a power of attorney? I do not ask you to give it in days or weeks. State your best recollection.

A. I cannot tell you.

Q. Was it shortly after?

A. I haven't the most remote idea.

Q. Who drew that power of attorney, can you tell that—who prepared it?

A. I never have seen it.

Q. You might know who prepared it without having seen it?

A. No, I do not know.

Q. Am I to understand that you do not know who prepared it?

A. I do not know who prepared it.

Q. Was Mrs. Fayerweather going out of the house at the time that you learned of that power of attorney? Was she going down-town attending to business?

A. Why, Mrs. Fayerweather was within a week of her death able at times to go out, to go down-town.

F. 1827 Q. Did she go down-town from time to time?

A. She did; she took short trips; she went to California and she went about the country generally, but she had of course her sick days.

Q. The codicil is dated January 12, 1891; the true date as I understand being January 12, 1892, and was witnessed by Ellen R. Cheney and George H. Cheney, of Rutland, Vermont. Was Mrs. Fayerweather at Rutland at that time?

A. No, sir; she was at home. She was never in Rutland in the winter season—that is January.

Q. Who are Ellen R. Cheney and George H. Cheney?

A. George H. Cheney is from Rutland, Ver-
F. 1828 mont, and he married Mr. Reynolds' sister. Ellen R. Cheney is a sister of my husband. George H. Cheney is her husband.

Q. Was this codicil of January 12, 1892, executed at the house in Fifty-seventh street?

A. I presume it was; I was not present.

Q. Do you recall that in January, 1892, Mr. and Mrs. Cheney, Mr. Reynolds' sister and brother-in-law, were visiting at the house?

A. They were.

Q. Had you lived at the Fayerweather house for a number of years prior to Mr. Fayerweather's

death? If so, state in a general way about how long?

A. I had lived continuously with Mr. Fayerweather for twenty years.

Q. And did you continue to make that house your residence from Mr. Fayerweather's death down to Mrs. Fayerweather's death? A. I did.

Q. May we then infer that when you became
F. 1829 married Doctor Reynolds came there and made that his residence?

A. Mr. Reynolds came there.

Q. And are you still living there? A. I am.

Q. Prior to the execution of this will of June 3, 1891, was there executed by Mrs. Fayerweather another will?

A. I think there was, but I never saw that will; I do not know the contents of it at all.

Q. Did I ask you whether you knew the contents?

A. I will tell you, I did not. I never saw the will; I heard that there was a will.

F. 1830 Q. Did you not in that same connection learn that that was a will greatly in your favor?

Objected to as immaterial and irrelevant.

The Court: How is it material?

Mr. James: I have let it go on, supposing there might be something to it, but I cannot see anything to it.

Mr. Parsons: On the question of interest.

The Court: It is shown that she has an interest in this will.

Mr. Parsons: Yes, but I wish to have that interest go back to a time anterior to the Surrogate's Court occurrence about which she testified.

Objection sustained. Exception.

Q. Was not the earlier will of Mrs. Fayer-

weather executed by her prior to the Surrogate's contest?

Same objection.

Objection sustained. Exception.

Q. Did you not know prior to the Surrogate's contest—that Mrs. Fayerweather had executed such a will, and that it made large provision for you—made you residuary legatee?

Same objection.

Objection sustained. Exception.

F. 1831 Q. Were you present on each day that the Surrogate's contest—the contest over the will—was in progress?

A. Well, I do not think I was there each day. I was there a number of times.

Q. Have you any recollection that there was any day when anything was done that you were not present?

A. No, I couldn't tell anything about it.

Q. What?

A. I couldn't say; I do not think I was there every day.

Q. Do you do not recall that it was your

F. 1832 purpose to be there every day?

A. It was my intention, but I was quite unwell at that time; not able to attend always.

Q. Were you in attendance as a possible witness?

Mr. James: I object to that; it calls for a conclusion. I do not object to his asking if she was subpœnaed there by anybody.

A. I was never subpœnaed as a witness.

Q. That is an answer to Colonel James, not me?

A. I never asked to be witness.

Q. I want to know whether it had been intimated to you that you might be a witness, and whether upon that you attended upon the contest? A. No; I had no such idea in view.

Q. Was there not talk during the trial about your being a witness?

Objected to as immaterial and not cross-examination.

Mr. Parsons: In her hearing, of course.

Objection sustained. Exception.

Mr. James: I make the same objection.

Q. Do you know Miss Elizabeth Joyce?

A. She is my niece.

Q. Did she from time to time attend with
F. 1833 you at the trial?

A. She was there; not all the time; she was a witness in the suit, and I could not say that she was there every day; I do not think she was.

Q. Were you there the day she was examined as a witness?

A. Yes.

Q. Did you hear her testimony of what occurred on the 15th, or, I will preface that by inquiring, was she there to be examined as a witness to the last codicil, the codicil of the 15th of November?

A. I think so.

Q. And did she testify upon that subject?

F. 1834 A. I presume she did; she was a witness and she was called, but I cannot recall her testimony.

Q. So I see; but do you not remember the fact that she was examined as a wituess to the last codicil?

A. Yes, sir.

Q. Do you not remember that she was examined at a very great length as to the occurrences of the 15th of November, where different persons were at different parts of the day?

A. I cannot remember her.

Q. I do not ask you what she said, but do you

remember whether she was examined as a witness on that subject?

A. I presume she was.

Q. Is that your recollection?

A. That is my recollection.

Q. Is it a fact that the room which has been spoken about in your testimony as Mr. Fayerweather's room was the rear room on the second story of the house No. 11 East Fifty-seventh street?

F. 1835 A. There is an extension beyond. Yes, it was the rear room of the main house.

Q. And, if I understand your testimony correctly, that connected with another room on the same story—the front room on the street—by a bathroom or by a bathroom passage?

A. The rear of the house is; there is an extension built, which connects by a bathroom with Mr. Fayerweather's room.

Q. What I wish to ascertain is what connects the front room of the second story with Mr. Fayerweather's room?

A. Simply closets—a passageway—dressing-room.

F. 1836 Q. The length of this passageway being about what?

A. I cannot tell you how many feet—sufficiently long for three doors.

Q. What was the use to which was put the front room?

A. Sitting-room.

Q. And did it go by the name of Mrs. Fayerweather's room?

A. Went by the name of general sitting-room for the family.

Q. Where was Mr. Fayerweather's bedroom?

A. The extension rooms which I have just described to you.

Q. During the 15th of November where was Mrs. Fayerweather?

A. Principally with her husband.

Q. At other times where?

A. In the sitting-room.

Q. And at other times where?

A. I can't say.

F. 1837 Q. Did she go off the floor at any time during that day?

A. She did—to her meals—her luncheon and her dinner.

Q. Except on those occasions, did she go off the floor on that day?

A. Not that I know of.

Q. I understand you to have testified that from the time that Messrs. Grout and Browning who were witnesses to the codicil of that date, left Mr. Fayerweather's room, down to the time of Mr. Fayerweather's death, you were continually in that room with him except on the two occasions about which you have testified;

F. 1938 the one when you went to the kitchen with Mr. Vaughan, and the paper about which you have testified was destroyed; and and the other occasion being at 7 o'clock that evening when you went to the dining room, had dinner, and after dinner returned?

A. I did not go to dinner: I went to the dining room with Mr. Vaughan.

Q. I understand your testimony to be that, with the exception of those two occasions you were continuously, or to use another expression used by you, "all the time" and, to use still another expression used by you "every moment"

in Mr. Fayerweather's room, from the time Messrs. Grout and Browning left down to Mr. Fayerweather's death; is that so?

A. I so believe.

Q. But cannot you make a stronger statement?

A. Well, I will tell you positively I was.

Q. Have you not intended upon this trial, and to-day, to testify that you were during the whole of that period, every moment of the time, in Mr. Fayerweather's room?

F. 1839 A. Yes; I do not know of anything I went out of the room for. I was his nurse, and the only nurse he had; he was a dying man.

Q. Are you getting at this fact, the fact that you were there every moment of the time, from a process of reasoning, or from a process of memory?

A. Process of memory.

Q. Process of memory? A. Yes, sir.

Q. Who attended the household matters of the Fayerweather household at that time?

A. Well, I did not that day.

Q. In whose general charge were household matters?

A. Charge of the servants at that time.

F. 1940 Q. Did the servants have no mistress?

A. Not at that time.

Q. Were you not generally in charge of the household affairs?

A. I was, but that day I gave no orders to any one about the house.

Q. Are we to infer from what you have said that from the time Messrs. Grout and Browning left down to Mr. Fayerweather's death, you neither ate or drank anything?

A. I did not taste a thing.

Q. Nor drink anything?

A. Nor drink anything. I might have taken

a glass of water, but I took no nourishment whatever that day.

Q. And you did not even take a cup of tea?

A. I went downstairs for that purpose with Mr. Vaughan, and I had the tea poured, but I did not taste it.

Q. Let me see if I cannot satisfy you in that respect of your being at Mr. Fayerweather's bedside during all of this time, you are mistaken?

F. 1841 A. No, sir; you can try.

Q. Do you know Mr. Myrick?

A. I know Mr. Myrick.

Q. When did you become acquainted with Mr. Myrick?

A. I really cannot tell, I have known Mr. Myrick for a number of years, but I cannot tell you how long.

Q. Did you know him for a number of years before Mr. Fayerweather's death?

A. I did.

Q. And did you during that period know that he was Mr. Fayerweather's personal and confidential representative or clerk?

F. 1842 A. I did.

Q. Was he in the habit of calling at the house?

A. He was.

Q. Now bring your mind to the time when Messrs. Grout and Browning left the room. Does your recollection accord with that of Mr. Vaughan's, that Mr. Vaughan went down to the front door with them?

A. Why, he was going down the stairs; he was going in that direction.

Q. And did he then return?

A. I do not know what he did; I saw him awhile after that, but not very soon.

Q. Did you not see him in Mr. Fayerweather's room after that?

A. I did, not immediately.

How shortly after Messrs. Grout and Browning left do you think you saw Mr. Vaughan in Mr. Fayerweather's room?

A. Mr. Vaughan may have come into the room. I do not remember that he did: he may have done it; if he did he said nothing to Mr. Fayerweather.

F. 1843 Q. Do you know how long he was in the room from the time of the departure of Messrs. Grout and Browning down to Mr. Fayerweather's death?

A. Mr. Vaughan did not spend his time in Mr. Fayerweather's room, much of the afternoon.

Q. I haven't asked that. I want to ask again how much of the time, say from half past two or three o'clock on, Mr. Vaughan was in Mr. Fayerweather's room?

A. I don't recollect that he was there for any length of time.

Q. Is this as exact a statement as you can make
F. 1844 about Mr. Vaughan being in Mr. Fayerweather's room while Messrs. Grout and Browning were there?

A. It is; my thoughts were not on Mr. Vaughan; they were on Mr. Fayerweather.

Q. Do you remember this, that after Messrs. Grout and Browning left, you told Mr. Vaughan that you thought Mr. Fayerweather was very seriously ill, that you wished Mr. Vaughan to spend the night there, and that you asked him to telegraph or telephone to his family at Orange?

A. I asked Mr. Vaughan to remain at the house; that is so.

Q. Do you remember the fact that you asked him to telegraph or telephone to his family?

A. He said that he would do that himself: I did not suggest it to him.

Q. Did not something occur about his telegraphing or telephoning to have a bag of clothing sent?

A. I made no such suggestion to Mr. Vaughan; that was his idea.

Q. I want to know if this occurred: I am not charging you with it?

F. 1845 A. I simply asked him to remain at the house?

Q. Where did that conversation take place?

A. Possibly in the sitting-room, possibly in the bed-room. It was in Mr. Vaughan's presence; whether it was on the way going downstairs to burn the paper or not, I cannot tell. I might have asked him; I do not know.

Q. When you say the bed-room, whose bed-room do you mean?

A. I mean Mr. Fayerweather's. When I say I was continually at Mr. Fayerweather's bedside —I was the nurse—I may have passed through that passage; that is what I mean. I do not mean that I stood like a statue by the side of his

F. 1846 bed.

Q. Do you not remember that you went downstairs that afternoon?

A. I did not only on those occasions. I went downstairs on those two occasions.

Q. Do you not remember that there was another occasion, at least one, when you went downstairs?

A. No, sir.

Q. Fix the time when Messrs. Grout and Browning left, according to your recollection?

A. I never looked at the time; I couldn't tell you the time.

Q. Can you not approximate it?

A. No, sir; I cannot.

Q. Can you fix the time when they came?

A. I cannot.

Q. Do you not remember that you made the arrangement for the witnesses and for the execution of the codicil by Mr. Fayerweather?

A. I made the arrangement for the doctor and
F. 1847 my niece to be present at four o'clock.

Q. Was there not some arrangement of chairs in the front room, preparatory to going into the rear room for the execution of the codicil?

A. I couldn't tell you.

Q. Were not you there supervising the arrangements?

A. No, sir; I was not.

Q. Were you in the room while the codicil was being executed?

A. I was not.

Q. Where were you during that time?

A. I was in the extension room, Mrs. Fayerweather's room.

F. 1848 Q. Were you not in the front room during any period of the time while Messrs. Grout and Browning were there?

A. I have no recollection of Mr. Grout and Mr. Browning except seeing them go down the stairs. I never knew, until I heard the testimony, that I was in the sitting-room, and was introduced to them. I have no recollection of it.

Q. You have forgotten?

A. No, have not forgotten.

Q. Do you know your niece, Miss Lizzie Joyce, also testified that you were in the front room and made the introduction or something to that effect?

A. I have a recollection; I saw it in her testimony.

Q. If that is so, it has gone out of your memory, has it?

A. I was not there.

Q. You contradict her, do you?

A. I contradict her.

Q. Can you fix the hour when Mr. Vaughan came to the Fayerweather house that morning, with any degree of accuracy?

F. 1849 A. Yes, sir, because——

Q. (Interposing). Never mind the reason.

A. At ten o'clock in the morning.

Q. Ten o'clock in the morning?

A. About ten o'clock.

Q. Where were you when Mr. Vaughan left to go down to Messrs. Arnoux, Ritch & Woodford's office?

A. I was either in the sitting-room or going towards the bed-room.

Q. Was it then that you had this conversation with Mr. Vaughan about sending for the doctors, or having the doctors as witnesses?

A. Yes.

F. 1850 Q. Cannot you fix about the time when that occurred?

A. I was talking about——

Q. (Interposing) I ask about the time when Mr. Vaughan left to go to Messrs. Arnoux, Ritch & Woodford's office?

A. Between 11 and 12.

Q. Nearer 12 or nearer 11?

A. Nearer 12.

Q. Were you in Mr. Fayerweather's room at any portion of the time in the morning when Mr. Vaughan was there?

A. I was not, excepting when I took Mr. Vaughan to the room.

Q. Did you see Mr. Vanghan when he returned with Messrs. Grout and Browning. You say he left about 12 o'clock. Did you see him when he returned?

A. I have no recollection of seeing Mr. Vaughan or Mr. Grout or Mr. Browning until I saw them going out.

Q. Can you not give some approximation to the
F. 1851 time of day when that was—the time you saw Messrs. Grout and Browning leaving?

A. I cannot. If I was to give any time, I should say probably somewhere near two o'clock.

Q. I think you did fix the time quite accurately when something was said by Mr. Fayerweather about Mr. Vaughan leaving the room. That I understood you to say?

A. Well, that was after the gas—

Q. (Interposing) That was about half-past 5 o'clock or so?

A. It was after the gas had been lighted in the evening. That is why I remember the time—in the early evening and before dinner time.

F. 1852 Q. And do you fix that time between 5 and half-past 5.

A. I said somewhere about that time, I might be mistaken. It was before the family went to dinner.

Q. This was during the short days of the middle of November? A. Yes.

Q. Have you any memorandum which enables you to state where, during this period from two o'clock when Messrs. Grout and Browning left, down to five or half-past five, when Mr. Vaughan came into Mr. Fayerweather's room, and there was

made this remark—where during that period Mr. Vaughan was?

A. He was in the sitting-room and went to walk, I think, in the afternoon.

Q. Went where?

A. I think he went out for a walk.

Q. Can you say where he went out for a walk?

A. No, sir; I heard afterwards; that I do not know; he was not around there.

F. 1853 Q. At any portion of the time was he going to and fro between Mr. Fayerweather's room and the sitting-room?

A. No, he was not.

Q. How did he reach Mr. Fayerweather's room?

A. If he reached Mr. Fayerweather's room at all, of course he went there.

Q. But you have said he was not?

A. He was not continually passing to Mr. Fayerweather's room.

Q. I want to know whether from time to time he went between the two rooms? A. Possibly.

Q. Is that as accurate information as you
F. 1854 can give—that it was possibly so?

A. It is. Why, my mind was not on Mr. Vaughan; it was on Mr. Fayerweather. Recollect that.

Q. But you do know, do you not, that at the time of the destruction of the paper or instructions in that regard Mr. Vaughan was in the room?

A. Certainly; he came to the room and asked that question.

Q. And he was also in the room when there was made a remark about his going away?

A. Yes.

Q. Can you give any accurate statement at all about the times when Mr. Vaughan was in the room, the times he was in the sitting room, and the times when he was going to and fro?

A. I do not remember any times when Mr. Vaughan was in the room, except the two I have stated here.

Q. Is that as strong a statement on the subject as you are to make?

F.1855 A. It is.

Q. That is as far as your memory goes?

A. That is as far as my memory goes.

Q. Let me ask you whether during that afternoon, the latter part of the afternoon, but before this "leave the room occurrence," Mr. Myrick called, sent up to the second story, you went down to see him, and you had a conversation with him in the parlor—at the parlor door?

A. I have no recollection of it at all.

Q. If your previous story that you were continually——

A. (Interposing) I have no recollection of go-

F. 1856 ing downstairs to see any one.

Q. (Continuing) If your previous statement to the effect that you were every moment of that time, with the exceptions referred to, in Mr. Fayerweather's room, and by his bedside, were true, would it not be impossible that you should have gone down and had a conversation with Mr. Myrick?

A. Yes, quite so.

Q. And yet, whether you did have such a conversation or not, you fail to remember?

A. If asked the question, I should say no. I have no recollection of it at all.

Q. And yet, notwithstanding you have no recollection, if asked the question, you would be willing to say no?

A. I have no recollection of Mr. Myrick being at the house.

Q. Notwithstanding that you have no recollection, you are not willing to say that you did not go down to see Mr. Myrick?

A. I have told you the only times I left the
F. 1957 room that I can think of.

Q. Then it comes down, does it not, to the possibility of your memory being at fault in respect to what occurred that afternoon?

A. I might have received callers, but it is all a blank to me, Mr. Parsons. I think my mind was too much on Mr. Fayerweather's condition. I expected every minute would be his last, and I was anxious to stand by his bedside and minister to his wants; there was no one else in the wide world to do it.

Q. And whether you might have received several callers that afternoon or went down to the first story to see them, your memory is now at
F. 1858 fault?

A. I say I might have done it, but it is not probable that I did. I will not say that I did not.

Q. You have testified, with respect to the letter Exhibit K, that letter being signed by Mr. Fayerweather, addressed to Mr. Thomas G. Ritch, and dated November 13, 1890,

(See Appendix of Exhibits No. 31.)

that it was written by Mr. Vaughan; and as to the letter Exhibit J,

(See Appendix of Exhibits No. 33).

also signed by Mr. Fayerweather, you have testified, as I understand, that that was written by you. Is that so?

A. Yes, sir.

Q. Where were those letters written?

A. In the sitting-room.

Q. At the same time?

A. Yes, sir; at the same time.

F. 1859 Q. Were you engaged in writing at the same moment, or did one or the other write first?

A. Mr. Vaughan was writing his letter, and I was writing the letter by Mr. Fayerweather's dictation.

Q. Was Mr. Fayerweather in the sitting-room at that time?

A. He was.

Mr. Parsons: That explains it; I supposed he was in the bed-room.

Mr. James: Won't you ask, right in that connection, how he was there? I understand he had a sort of chair that they moved him about in.

Q. Was he sitting in a chair?

F. 1860 A. He was sitting in a chair, but he was not able to walk from his room, we put him in a chair and rolled him; he had it for that purpose.

Q. He was wheeled in a chair from one room to the other? A. Yes.

By Mr. James:

Q. An invalid chair? A. An invalid chair.

By Mr. Parsons:

Q. Where did that chair stand on the 15th of

November, in Mr. Fayerweather's room or in the sitting-room?

A. I suppose it was in the sitting-room; it might have been probably in both rooms, we were not using it.

Q. Do you mean you were not using it then?

A. We were not using it on the 15th of November.

Q. Was not Mr. Fayerweather in that chair on that day? A. He was not.

F. 1861 Q. Are you quite clear about your recollection of that?

A. I think that just about half an hour before Mr. Fayerweather's death, we tried to [illegible] him from the bed into the chair, and he fainted, and after trying to move him to the sitting room we moved him back; we thought we would air the room.

Q. Is that the only recollection that you have of the use of that chair by Mr. Fayerweather that day?

A. That is the only recollection I have.

Q. As I infer from your previous testimony you were not present in Mr. Fayerweather's

F. 1862 room when Messrs. Grout and Browning and Miss Lizzie Joyce were there witnessing the execution of the codicil?

A. I was not.

Q. And, of course, are not competent to tell where Mr. Fayerweather was at that time?

A. I do not know, I was not there.

Q. Come now, please, to the incident at the Surrogate's Court, when, according to your emphatic gesture, Mr. Vaughan——

A. (Interposing) Shook his fist at me. I will help you.

Q. (Continuing) With his fist doubled, had

some conversation with you, which ended with your saying to him, "Thanks!" Was your expression or part in this conversation serious, sarcastic or satirical, or what was it — your expression, thanks?

A. I think it was satanical.

Q. Yours was satanical? A. Yes.

Q. Was it then for the first time that you discovered that Mr. Vaughan has a somewhat emphatic way of expressing himself?

F. 1863 A. Oh, no, sir; I have heard him several times.

Q. You have been in the habit of observing for many years before this, had you not, that M. Vaughan had a rather excitable and a somewhat emphatic mode of gesticulating and expressing himself?

A. Yes, but never to me before.

Q. There were other persons, I suppose, whom you saw him in conference with, and in this way you had learned that that was Mr. Vaughan's mode?

A. Yes, when he wished to threaten any one; he has done it before; I have seen him do it.

Q. When did it first come to your mind that Mr. Vaughan had an emphatic way of expressing

F. 1864 himself? How many years before Mr. Fayerweather's death?

A. I do not think I had known him very many months without discovering that.

Q. Then, when did your acquaintance with him begin?

A. Well, I have known Mr. Vaughan for a number of years. I couldn't tell you; I do not know when I did not know him after I lived in New York.

Q. I had it in mind, if you have no objection to put to you the question which has been put to so many of my witnesses an inquiry as to

your age. Have you any objections to telling?

A. Not at all. If I live till the 16th of February I shall be 48 years old; I am rather proud of it.

Q. May we assume that for years prior to Mr. Fayerweather's death, you knew as well as any one, what was the condition of your sister's health, and what affected her, and what did not affect her? What made her nervous, and what did not; what excited her and what did not?

A. I suppose I knew as well as any one could know. Of course, I was her nurse, and the only
F. 1865 one she had.

Q. Did you ever intentionally say or do anything to her which you thought could injuriously affect her?

A. Why, not to my knowledge.

Q. To your knowledge?

A. I never intended to say or do anything to my sister that would injure her health.

Q. Was it ever in your mind that anything you said or did to her could injure her or make her nervous or excite her or otherwise injuriously affect her?

A. Possibly I may have done it several times a day.

F. 1866 Q. But did you ever intend to do it?

A. I never intended to do it, certainly.

Q. I understand you to say that whatever did pass between you and Vaughan on the occasion at the Surrogate's office you repeated to your sister? A. I did.

Q. But, if you had supposed that was anything which could affect or excite her, or make her nervous, you wouldn't have done it, would you?

A. If I had taken more time to think of it, I probably should not have told her. I had a

severe reprimand from Dr. Irwin for telling her. If I had taken time to think of it, I wouldn't have told her.

Q. You take time to think, do you not?

A. I did not, it seems.

Q. If it has been in your mind when you repeated this conversation to your sister, that it would excite her or in any way injuriously affect her, you would not have told her, would you?

F. 1867 A. Certainly not. My idea was not to excite or injure my sister, for her life was too precious to me.

Q. I want to fix as nearly as I can the day on which that occurrence took place, and can you assist me? Perhaps you can tell who was examined as a witness on that day?

A. I cannot tell you; I never was in the Court but once after that. I should say it was the last Court day of February. The last week of February and that is as near as I can fix it. I could not tell you the date.

Q. Were you there when there was some talk about locking up Mr. Prescott Hall Butler; that

F. 1868 occurred on the 26th of February, according to your memorandum?

A. Yes, I was there when he refused to tell what was in the codicil, and the Judge told him he could tell or go to Court. I cannot remember the circumstances.

Q. Your Counsel moved to send him to the lockup?

A. I think so. I do not know who made the threat, but I know such a threat was made.

Q. And it came from your side, did it not?

A. I was really not in the contest.

Q. I know, Colonel James said so?

A. You know it yourself; you do not want Colonel James to tell you that.

Q. Was it made by the lawyers for Messrs. Buckley, Ritch and Vaughan?

A. I really do not know who made it. I do not think that probably they made the threat. I think probably it came from the Surrogate.

Q. Cannot you remember what occurred on that rather striking subject on that day?

Mr. Root: Objected to as immaterial and
F. 1869 irrelevant.

Objection sustained.

Mr. Parsons: May I not test her memory, sir?

The Court: You have tested it enough.

Mr. Parsons: I do not wish to press it unduly.

The Court: It seems to me that it is unnecessary to press it farther. The question that you asked or was going to ask her was, was it on that day that this conversation with Vaughan took place?

The Witness: Well, I cannot tell that. I can
F. 1870 tell pretty near to the day, because I know I was unwilling to go to Court after that. But I did go at the strong urging of Dr. Irwin.

Q. Do you remember that on the 25th of February, there were examined as witnesses Mr. Vaughan, Dr. Vedder, Dr. Wilcox, Mr. Vaughan recalled, and Mr. Ritch.

A. I couldn't testify to that, because I do not remember.

Q. Were you present when Mr. Vaughan was examined as a witness?

A. I heard part of Mr. Vaughan's testimony.

Q. You heard part of it?

A. Yes, sir; I heard part of it.

Q. And do you remember he was examined as a witness on the 26th of February?

A. I do not; I could not give you the dates of that trial at all.

Q. Were you present when the deed of gift was exhibited, spoken about and read?

A. In Court?

Q. In Court?

F. 1871 A. No, sir; I do not remember that. It might have been done, but I do not remember that deed of gift having been read in Court.

Q. Don't you remember the talk about it in Court?

A. I saw it in the newspaper.

Q. It was generally published, was it not?

A. I saw it in print somewhere; I do not know where.

Q. It was in the newspapers somewhere; it was published?

A. I think I saw it in the newspapers, but I do not think I have ever read it.

F. 1872 Q. Were you there when an argument was made by Mr. Coudert and Judge Rollins about having probate refused upon the testimony of the subscribing witnesses; there was a long argument had, I presume?

A. I heard the argument.

Q. Don't you remember that?

A. I cannot recall the argument.

Q. Don't you remember that Mr. Parsons on that occasion indulged in some feeble remarks?

A. I, yes; I remember Mr. Parsons' remarks very well.

Mr. James: Do you remember that they were feeble?

Mr. Root: They were more feeble than Mr. Vaughan's, were they not?

The Witness: Yes.

Mr. Blaikie: Did he shake his fist at you?

The Witness: No; not at all.

Q. Were not some rather unpleasant questions put by Mr. Coudert to Mr. Vaughan?

A. To Mr. Vaughan?

F. 1873 Q. Yes.

A. I should have thought so if I had been on the witness stand and had to take them.

Q. And in this argument of Mr. Coudert's that you heard, things were said about Mr. Vaughan, were they not? A. I presume so.

Q. Don't you remember it?

A. I couldn't tell what they were. I remember more particularly the remarks of Mr. Parsons.

Q. The last days upon which the proceedings took place in the Surrogate's Court were February 25th, February 26th and March 2nd; that was the last date; can you fix this occurrence with reference to either of these dates?

F. 1874 A. Probably I should say the 26th.

Q. I think that was what Dr. Irwin said, that it was the 26th.

A. I did not hear that what he did say, I could not catch the time.

Q. You were here when Dr. Irwin was examined as a witness, were you not?

A. This time yesterday?

Q. Yes. A. Yes.

Q. He did not testify to your saying "thanks," but he did say that he drew some inference from the fact that you were pale. You are habitually pale, are you not?

A. Well, yes.

Q. And have been for a long time, have you not?

A. From my birth.

Q. Will you now look at the paper which I now show you, which is the paper that has been marked "Exhibit H," the private memorandum of March 22, 1889, (See Appendix of Exhibits, No. 29—page 220) and tell me whether you were present in the Surrogate's Court when that
F. 1875 paper came into evidence?

A. Yes, it was shown to me in reference to my writing on the bottom.

Q. Your writing upon it?

A. Yes.

Q. Is the portion of this private memorandum which reads thus: "I also wish that $1,000 be given Miss Joyce immediately after my decease, in addition to the provision made for her by my will," in your own handwriting?

A. No, sir; I wrote no such thing as that?

Q. What part of the memorandum is in your handwriting?

The Court: The part just above.

F. 1876 Mr. Parsons: Does it appear which is in her handwriting?

The Court: She testified to it.

Mr. Parsons: Has your Honor any objection that it shall appear in this connection?

The Court: No.

Q. Just read that part of the paper which is in your handwriting?

A. "Also James who now opens and closes the store, $100; John Dixon, $200." That is all I wrote; the other is Mr. Ritch's handwriting.

Q. What follows?

A. Yes, sir.

By Mr. Root:

Q. What follows is Mr. Ritch's handwriting?

A. Yes, sir.

By Mr. Parsons:

Q. I think you have testified that immediately after Mr. Fayerweather's death there was given to you $1,000?

A. Yes, sir.

Q. And that you received it from Mr. Vaughan?

A. From Mr. Vaughan.

F. 1877 Q. Was Mr. Fayerweather's will read publicly after his death?

A. It was read to the members of his family.

Q. Where?

A. In the dining-room at the house No. 11 East 57th Street.

Q. Were you present?

A. I was.

Q. Were all the papers read at that time, the will and the several codicils?

A. I suppose so. My mind was not very much on it. There was a clause in the will which was not read as regarding me.

Q. The sixth article begins, "I give and F. 1878 bequeath unto Anner Amelia Joyce for and during her life, or so long as she remains unmarried?

A. That was not read. The married part was left out.

Q. Out of deference to your feelings?

A. Yes, sir.

Q. You discovered afterwards that Mr. Fayerweather had put that in, or it was in the will?

A. I was told it was before it was read.

Q. But you say that the unmarried was left out, out of deference to your feelings, but after that you saw the will, did you not, or saw a copy of it?

A. I saw it in the papers when it came out.

Q. Were you told prior to the reading of the will that the legacy to you was conditioned upon your remaining unmarried?

A. I was told prior to the reading of the will first by Mr. Vaughan at seven o'clock, that time in the dining-room—at seven o'clock in the evening—previous to Mr. Fayerweather's death, that that clause was in the will regarding me. I had a talk with Mr. Ritch about it before the will
F. 1879 was read. I heard it the second time.

Q. And you thought it——

A. (Interposing) I thought it rather strange. I did not want it put in the papers. I hated to have the thing published in the papers, because it was a stain on Mr. Fayerweather's name, his honor; that was the only thing I cared about.

Q. And may I not assume that you were resentful about it?

A. I felt extremely sorry that the world should know that that thing was in the will.

Q. That was in the will that was executed in 1884, was it not?

A. (Not answered.)

F. 1880 Q. Did you not, prior to this occurrence in the Surrogate's Court, make that provision the subject of somewhat animated remark on your part in conversation with Mr. Vaughan?

A. Mrs. Fayerweather did; I do not think I did, and I checked her from saying anything.

Q. Do you not remember that you did?

A. I do not remember saying anything myself, but my sister said it was unjust, and the reason why she thought it was unjust, but I said nothing.

Q. I am particularly concerned about what may have been said by yourself?

A. I do not remember criticizing Mr. Fayerweather for anything he has done.

Q. That is not within what I desire to ask, but what I want is, whether or not long before this occurrence in the Surrogate's Court, pehaps on the same day, something disagreeable was not said by you or counsel to Mr. Vaughan, or in the hearing of Mr. Vaughan, arising out of that occurrence?

A. Something by Mrs. Fayerweather's counsel might have been said, but nothing personally by
F. 1881 me.

Q. Do you not remember that there was something of the kind the day Mr. Vaughan was examined as a witness?

A. Something said to him?

Q. Something said, the purpose of which was to put upon Mr. Vaughan the responsiblity of this provision in the will of 1884?

A. Why, Mr. Vaughn is not at all responsible for it, and no one ever accused him of it.

Q. Did you not say something, or was there not something said by the lawyers that day, upon that subject, making him responsible or charging him
F. 1882 with responsibility for that?

A. I don't remember it, and I regret it exceedingly if there was such a thing done.

Q. Don't you recall something of that kind?

A. I do not. I do not remember that Mr. Vaughan was ever accused of anything of the kind. He certainly is not responsible for it.

Q. Do you remember a conversation with Mr. Vaughan that Saturday evening, the evening of Saturday, the 15th of November, about that provision—the provision against your marriage?

A. A. Yes, Mr. Vaughan told me it was in there; that was the first I knew of it.

Q. And he did not also tell you that he had

authority or permission, or something of the kind from Mr. Fayerweather, by which that could be changed?

A. He did.

Q. When was that?

A. That was at that seven o'clock interview, and he said——

Q. That is all I ask.

A. (Continuing) That he had been requested by Mr. Fayerweather to have that changed.

F. 1883 Q. Permit me, please. I want to fix the time of that.

Mr. James: Q. What day?

A. Saturday, the evening of the day Mr. Fayerweather died. The time I went to the dining-room.

Q. Were you present at the conference between Mr. Fayerweather and Mr. Vaughan, when Mr. Vaughan received that permission from Mr. Fayerweather? A. I was not.

Q. Where is Miss Lizzie Joyce now?

A. She is in the New York Hospital.

Q. Is she sick, or is she a nurse there?

A. She is studying for a nurse, for the train-

F. 1884 ing school of the New York Hospital.

Q. I omitted to ask you one thing. When did you become acquainted with Judge Beardsley?

A. I have known him all my life.

Q. Forty-eight years?

A. No, he is not quite that old. I have known him all his life.

Q. May say that you have known Judge Beardsley for over thirty years?

A. Well, I have known Judge Beardsley—of course, I was born very near the place where Judge Beardsley was born; but, of course, our

lives have separated; I have known him since his marriage, which was about 20 years ago.

Q. He married Mr. Fayerweather's niece?

A. Niece.

Q. He is the gentleman who is made an executor by Mrs. Fayerweather?

A. Yes.

Q. When last did you see him?

A. I haven't seen him for months; I do not know when I last saw him.

F. 1885 Q. Not for months. A. No."

Re-direct examination of *MRS. JOYCE-REYNOLDS.*

By Mr. James:

Q. Who was it told you how that provision putting a restraint upon your marriage, or at least discontinuing the annuity to you upon your marriage, came into the will?

A. Mr. Vaughan told me.

Q. Was that at the time that you and Mr. Vaughan went down to the dining-room in the evening of

F. 1886 Saturday, November 15, 1890? A. Yes.

Q. What was it Mr. Vaughan said to you?

A. Asked me if I knew of such a provision.

Q. Well?

A. I said I did not. He said it was in the will.

Q. Was that substantially all the conversation?

A. I said, "Did Mr. Fayerweather desire it?" and he told me that he had ordered it changed, or given him permission; he had ordered him to change it, "but if he dies to-night it can't be done."

Q. Was that substantially all the conversation on that subject?

A. On that subject.

Q. Was that the first time you had heard of it?

A. That was the first time I had ever heard it.

Q. Did you afterwards have a conversation with Mr. Ritch about it?

A. I did.

Q. When was that?

A. It was just before reading the will.

Q. Now, what did Mr. Ritch say to you about that provision?

F. 1887 A. I think I spoke to Mr. Ritch about it. He told me there was a clause.

Mr. Parsons: Is this material?

Mr. James: I do not know whether it is or not.

The Court: Does it make any earthly difference in this case whether she was allowed to marry again by the will; she did.

Mr. James: I merely wanted to show what the fact was that Mr. Parsons had called out.

Objection sustained. Exception.

Q. Now, you have said that after the funeral Mr. Ritch read to the relatives the will and the codicil. You remember the occasion, don't you, distinctly?

A. Yes.

F. 1888 Q. Did Mr. Ritch on that occasion read any of these private memoranda which have been put in evidence here?

A. I don't remember that he did.

Q. Did he say anything about there being any private memoranda?

A. No, sir.

Q. You were asked by Mr. Parsons about a suit commenced in the Supreme Court to set aside the releases or release of Mrs. Fayerweather, the widow. Do you remember that that suit was commenced by Mrs. Fayerweather before her death?

A. It was.

Q. And continued afterwards in the name of her executors?

A. It did.

Q. And subsequently Mrs. Achter and Mrs. Emma S. Fayerweather became parties to it?

A. They did.

Q. Now, were Messrs. Coudert and Holden ever, to your knowledge, at the residence of Daniel B. Fayerweather before his death?

F. 1889 A. No, sir.

Q. Who introduced them, if you know, to Mrs Fayerweather, or yourself?

Mr. Parsons: I cannot see the materiality of this.

Objection sustained. Exception.

Q. You have spoken in answer to Mr. Parsons about Mrs. Fayerweather's going downtown frequently; but I want you to tell us how she went, whether she walked downtown from her house?

Mr. Parsons: She has said that she never walked.

A. She never walked; she hadn't walked for years.

Q. How did she go, when you spoke of it?

F. 1890 A. In her own private carriage.

Q. In answer to Mr. Parsons, you said that you spoke to Dr. Vedder and Dr. Wilcox, and to your niece, Elizabeth R. Joyce, about being witnesses to the codicil executed by Mr. Fayerweathe on Saturday, November 15, 1890. At whose request did you speak to those persons to be witnesses?

Mr. Parsons: That is entirely immaterial.

Mr. James: I think it is not, or I would not have asked it.

The Court: I do not quite see the logic of it, or your purpose.

Mr. James: These doctors were attending physicians. They were perfectly competent to judge of the condition of Mr. Fayerweather and his ability to execute any paper at that time, and would have been most excellent witnesses as to his acts after twelve o'clock that day. I propose to show that Mr. Vaughan before he went down to Mr. Ritch's office to have this codicil drawn, selected them as the witnessss and asked Miss Joyce, now Mrs. Reynolds, to ask them to be present and fix the time, but that when he came up from
F. 1891 the office to have this codicil executed, instead of using these witnesses whom he had selected, he rejected them and used the clerks of Mr. Ritch.

Objection sustained. Exception.

Q. Now, in answer to Mr. Parsons, in speaking of this interview, when Mr. Vaughan shook his fist in your face——

Mr. Parsons: I wish you would modify your expression, or transfer your laugh to the stenographer's record.

Mr. James: He may take down the laugh.

Mr. Parsons: This gets into the record, and it is serious.

Q. (Continuing) you said that the remark made was satanical. I want to know whether you referred
F. 1892 to your remark "Thanks" made to Mr. Vaughan, or to his statement to you?

Mr. Parsons: Objected to, because she has already stated.

Objection sustained.

Mr. James: I thought at the time that the witness was under a misapprehension.

The Court: Ask her if she was.

Q. I ask you now, if you understood the answer "satanical" to refer to your remark to Vaughan or his remark to you?

A. I wouldn't say that to Mr. Vaughan; I would

accuse myself of being satanical before I would him. I did not say Mr. Vaughan was satanical.

Q. You answered to Mr. Parsons that if you had taken time to think, when you returned to Mrs. Fayerweather, after seeing Mr. Vaughan, that you would not have told her Vaughan's remark. Now, what did you mean by taking time to think; what was your condition at the time.

Mr. Parsons; Objected to as entirely immaterial.

Objection sustained. Exception.

F. 1893 Adjourned to to-morrow, Thursday, February 1, 1894, at 10:30 a. m.

(End of Seventh Day's Proceedings.)

Mr. Sherman: Now in regard to the deposition of Prescott Hall Butler, why don't you accept a general stipulation? That will save your time on that.

Mr. Bovee: Mr. Sherman, we have adopted our course after consideration, and we will adhere to that to the end.

Mr. Sherman: I thought it might be useful in the interests of saving time, but of course it is not com-

F. 1894 pulsory.

Mr. Bovee: It might just as well be done here as any other place.

Mr. Sherman: May I ask whether you want to cross examine Mr. Butler?

Mr. Bovee: I do not think there will be any cross examination of Mr. Butler on our part.

Mr. Sherman: So that we need not anticipate taking time for that.

Mr. Bovee: I cannot tell until I have read it through, but I assume on general principles there is nothing that we want to examine him about.

Mr. Sherman: The only pending witness now is Bay-

lor, is it not? Why don't you take some testimony next week? Can't you get at it next week?

Mr. Bovee: Well, I might about Thursday, but I could not before then because I would have to look the matter over and see what I want to put in.

Mr. Sherman: I cannot the end of the week. Suppose we have a truce of a week?

Mr. Bovee: That will be agreeable to me.

Mr. Sherman: Monday week then, at half-past ten.

Mr. Bovee: Why not dispose of Baylor?

Mr. Sherman: I expect him to come this after-
F. 1895 noon.

Mr. Bovee: If he does we will finish with him.

Mr. Sherman: Is it understood then that when we adjourn to-day we adjourn to Monday a week, at half-past ten?

Mr. Bovee: Yes. Mr. Sherman I will tell you what I would rather do if I could. Suppose we go on on Tuesday of next week?

Mr. Sherman: Do you mean to go on on Tuesday and no other day?

Mr. Bovee: No, I think I could go on on Tuesday and Wednesday.

F. 1896 Mr. Sherman: I am not sure that I can get witnesses here Tuesday and Wednesday. Can you take some testimony on your part then?

Mr. Bovee: No, I think not. There is only one thing I think I would do then on behalf of the defendants that would be to re-introduce, in view of your objection the documentary evidence which we put in during your absence.

Mr. Sherman: I do not think I would insist on that if it were reasonable.

Mr. Bovee: You moved to strike them out because

they were introduced during the pendency of a certificate before the Judge.

Mr. Sherman: I think that is technically sound but I won't press that. I do not waive the other objections to it. Is that all you want to prove?

Mr. Bovee: That is all I would be prepared to put in next Tuesday.

Mr. Sherman: I think as far as we are concerned another full day will finish our testimony. I
F. 1897 think we had better let it go over until Monday a week.

Mr. Bovee: Very well.

Mr. Sherman: Here is Mr. Baylor now. Would you prefer to go on with him or to go on with Mr. Butler? Will you give me a corresponding stipulation in reference to this Surrogate's record which I gave you in reference to the Five College record. that is to say applying whatever form that stipulation is in to the Surrogate's record in regard to printing it?

F. 1898 Mr. Bovee: What stipulation is that?

Mr. Sherman: I give you a stipulation that the Five College record need not be printed for final hearing or on appeal, but that the book might be produced and referred to. Do you remember that? That has been done several times in this case. It is in the beginning of your testimony. I will see if I can find it.

Mr. Bovee: Do you mean the same stipulation as was taken by Hamilton College in respect to printing the Amherst College record?

Mr. Sherman: It was intended to be, but it was a stipulation that was taken in this proceeding in the defendants' proofs, a stipulation which I gave you.

Mr. Bovee: Was there such a stipulation?

Mr. Sherman: Yes. If there was not my suggestion does not go. It is at page 7 and it follows a request of Mr. Parsons for a stipulation which is a request at page 6, and this is the stipulation "I consent that the papers referred to may be used on final hearing and upon any appeal herein without incorporating them in the record physically, providing the defendants make like stipulations on their part reserving all objections as to their competency, materiality and relevancy as evidence.

F. 1899 Mr. Parsons: We make that consent."

My suggestion is that the same stipulation apply to the printed record of the Surrogate's Court.

Mr. Bovee: You have introduced the original record from the Surrogate's Court?

Mr. Sherman: Yes.

Mr. Bovee: The stenographer's minutes?

Mr. Sherman: Yes.

Mr. Bovee: Now you propose to use in substitution for that and without printing it for the purpose of final hearing or argument at the Circuit Court of Appeals the printed book from which I have been working
F. 1900 for instance.

Mr. Sherman: Yes, and which Mr. Parsons qualified by his own description and said that it was presumed to be correct.

Mr. Bovee: And which the evidence shows was printed along as it was taken?

Mr. Sherman: Yes.

Mr. Bovee: I think we will make that stipulation Mr. Sherman. I will give you a final answer in respect to that at the next hearing. Of course I can

let you know before but I do not suppose it will be necessary. I prefer to consult Mr. Parsons about it I think we will give you the stipulation.

Mr. Sherman: Now we might as well take up the examination of Mr. Baylor.

Mr. Bovee: The defendant Hamilton College, while standing upon all the objections taking to the testimony of the witness Baylor declines to cross-examine said witness upon the ground that his testimony is entirely irrelevant and immaterial to
F. 1901 any of the issues raised by its plea to the cross-bill; and furthermore moves to strike out the whole of said testimony upon that ground.

Counsel for the defendant to this proceeding other than the defendant Hamilton College will proceed with the cross-examination of the witness, Mr. Reynolds. They do so under protest against being compelled to cross-examine on matters which are irrelevant to the issues raised by the special pleas. In the cross-examining the witness they do not waive their objection that such matter is irrelevant and immaterial. They make cross-examination and insist that it is in the nature of a *de bene esse* cross-examination conditioned on the
F. 1902 Court holding that the direct examination is relevant and material and before proceeding with the cross-examination they repeat the tender of the stipulation to strip the case of all irrelevant matter meaning by that matter which is irrelevant to the only issue which they understand to be before the Court, that of estoppel by the judgment in the case of Amherst College and others against Ritch which they have pleaded in bar. And before proceeding with the cross-examination the defendants move upon the record to strike out all the testimony of the witnesses as irrelevant and immaterial.

Mr. Sherman: Counsel for the complainants inquires whether the counsel for the defendants withdraw or move to strike out any evidence adduced by said defendants otherwise than as a result of the stipulation which they have just tendered.

Mr. Bovee: Counsel for the defendants do not consider it necessary to answer the inquiry of the counsel for the complainants in respect to those matters. He has made his tender and it stands upon the record for just what it means.

F. 1903

Mr. Sherman: Counsel for the complainants responds to the tender, under the circumstonces, that the defendants, having voluntarily adduced evidence which is not by any possible application relevant to the issues at large in this case and not to the plea of *res adjudicate* and persisting in retaining such evidence upon the record, that said defendants have placed all questions in the cause at large, overruled their pleas, and have by overruling their pleas placed the matters which they allege to have been adjudicated by the Five College record at large and free from any estoppel by judgment, and therefore decline to enter into the vague and one-

F. 1904 sided stipulation tendered. The complainants do not acquiesce in any limitation by the defendants of the legal effect of their cross-examination.

JOHN C. BAYLOR, recalled for cross-examination, testified as follows:

Cross-examination by Mr. Bovee:

XQ. What is your name? A. John C. Baylor.

XQ. Where do you live? A. What, now?

F 1905 61 XQ. Yes. A. I am living 223 West 41st street.

62 XQ. What is your business? A. Butler.

63 XQ. For whom? A. For Miss Bayliss at present.

64 XQ. Where? A. 116 West 123rd Street.

65 XQ. How long have you been employed by her?

A. Two weeks to-morrow.

66 XQ. John, when was it that you gave your testimony in this case?

A. It was in March, 1899.

67 XQ. Do you remember that fact distinctly?

A. Yes, sir.

68 XQ. Do you recollect who was present?

F. 1906 A. I cannot recollect all of them, I can recall some of them.

69 XQ. By whom were you examined?

A. By whom?

70 XQ. Yes?

A. Colonel James, I think it was.

71 XQ. When was that? A. March, 1899.

72 XQ. Were you examined by anybody else?

A. Why, Mr. Parsons asked me a couple of questions, that was all.

73 XQ. Colonel James represented Mr. Reynolds?

A. Yes, sir.

74 XQ. And Mrs. Fayerweather and Mrs. Achter?

A. Yes, sir.

75 XQ. Mr. Blaikie was present I suppose?

A. Who?

76 XQ. Mr. Blaikie? A. Mr. Blaikie?

77 XQ. Yes. A. I think he was in court.

78 XQ. Were you called by Mr. James?

A. Yes, sir.

79 XQ. Subpœnaed by Mr. Blaikie?

A. By Mr. Blaikie I think, or by that side, I do
F. 1907 not know whether it was Mr. James or Mr. Blaikie.

80 XQ. Are you sure you were not subpœnaed by Mr. Reynolds?

A. No, sir, I think not.

81 XQ. You think not?

A. I think not.

82 XQ. Your recollection is very clear about the matter, is it not, John?

A. Pretty clear.

83 XQ. And that was the last time that you testified, was it? A. Yes, sir.

84 XQ. What?

A. Is that the last time, did you say?

F. 1908 85 XQ. Was that the last time you testified?

A. Yes, sir.

86 XQ. How many times in all have you testified in respect to Mr. Fayerweather?

A. Only once.

87 XQ. Only once?

A. Yes, sir.

88 XQ. And that was the occasion when you were examined by Mr. James? A. Yes, sir.

89 XQ. You were then cross-examined by Mr. Parsons?

A. He only asked me a couple of questions, that is all.

90 XQ. He was counsel for the executors?

A. Yes, sir.

91 XQ. John, your recollection of that fact that you were examined at the time and in the manner and by the persons that you have spoken of here is just as distinct and just as clear in your mind as the circumstances occurring about the time of the death of Mr. Fayerweather?

A. Yes, sir.

92 XQ. Just as distinct?

A. Yes sir.

F. 1909 93 XQ. And just as true, are they not?

A. Yes, sir.

94 XQ. You are just as positive of them?

A. Yes, sir.

95 XQ. Do you remember when Mr. Fayerweather died? A. Yes, sir.

96 XQ. When?

A. November 15th, 1890.

97 XQ. November 15th, 1890?

A. Yes, sir.

98 XQ. Where were you, John, when the will contest was on in the Surrogate's Court?

A. What the first time?

99 XQ. Well, there was only one will contest in

F. 1910 the Surrogate's Court, John.

A. Well, at one time I was at 11 East 57th street.

I think that is where I was when it commenced.

100 XQ. How long did you remain at 11 East 57th streeet after the death of Mr. Fayerweather?

A. One year or a little over.

101 XQ. How?

A. A little over a year, I think.

102 XQ. Continuously employed there, I suppose?

A. Yes.

103 XQ. Never was away from the house any length of time?

A. Not any length of time.

104 XQ. That is you slept there every night?

A. Yes, sir.

105 XQ. You did not testify in the will contest, did you?

A. No, sir.

106 XQ. In your capacity as butler you looked after the door, did you not? A. Yes, sir.

107 XQ. Admitting and letting out such visitors as called? A. Yes, sir.

108 XQ. Do you remember Mr. Holden sometimes
F. 1911 being a visitor at the house?

A. Mr. Holden.

109 XQ. Yes.

A. I remember the name but I do not remember the gentleman.

110 XQ. Do you remember him as being associated with Mr. Coudert, Mrs. Fayerweather's lawyer.

A. Yes, sir.

111 XQ. As his partner?

A. I was always told it was Mr. Coudert, it might have been Mr. Holden, it was a small sized gentleman, kind of mixed gray hair, I always understood that it was Mr. Coudert but I found out afterwards that Mr. Coudert was a stouter gentleman.

F. 1912 112 XQ. Did you ever see Mr. Coudert?

A. Yes, sir.

113 XQ. Where?

A. I saw him up to the house at one time if I am not very much mistaken.

114 XQ. When was that, John?

A. That was about the time of the commencement of the will contest.

115 XQ. January or February after Mr. Fayerweather's death in 1891?

A. What did you say?

116 XQ. Was it in January or February of the year succeeding Mr. Fayerweather's death?

A. I do not remember just what time it was, I could not say.

117 XQ. On that occasion did Mr. Coudert see Mrs. Fayerweather?

A. Yes, sir.

118 XQ. The contest had then begun, had it?

A. I think so, I am not sure.

119 XQ. Is that your best recollection of it?

A. Yes, sir.

120 XQ. You recall letting Mr. Coudert in on that F. 1913 occasion? A. Yes, sir.

121 XQ. And did you escort him upstairs to Mrs. Fayerweather?

A. I did not, sir, I went upstairs and pronounced him being there.

122 XQ. And he saw her? A. Yes, sir.

123 XQ. Is that the only occasion, John, when you saw Mr. Coudert there?

A. That is the only time that I can remember.

124 XQ. Now you did see this Mr. Holden there on other occasions?

A. Yes, sir, I saw him several times.

125 xQ. John, give me your best recollection as to how many times you saw Mr. Holden, please?

F. 1914 A. Well, I do not know exactly because he was there several times, I do not know whether it was three times or four times or more.

126 xQ. Well, as a matter of fact, was he not coming in from time to time while this contest was going on?

A. Yes, sir, he did.

127 xQ. An on the occasions of his visits to the house he would see Mrs. Fayerweather.

A. He went upstairs, I do not know whether he saw Mrs. Fayerweather directly or not.

128 XQ. On the occassion of his visits you would announce to Mrs. Fayerweather his coming? would you?

A. Yes, sir.

129 XQ. And what would Mrs. Fayerweather say when you announced Mr. Holden in the manner in which you have indicated?

Mr. Sherman: Objected to on the ground that the inquiry relates to matters wholly unconnected with the question of *res adjudicata*, and such legal tendency as it may be imagined to have seems to be to create an estoppel against Mrs. Fayerweather and her executor and as such the evidence is evidence at large in
F. 1915 the cause and overrules the plea, while there is no pleading on file by there defendants under which they can take any advantage from the proof.

Mr. Bovee: Now, John, answer the question.

(Question No. 129 was repeated by stenographer.)

A. She would say "Let him come up".

130 XQ. Do you know Judge Beardsley, John?

A. Yes, sir.

131 XQ. Have you seen Judge Beardsley at the house from time to time during the contest?

Mr. Sherman: Same objection as to last question objected to.

F. 1916 A. Yes, sir.

132 XQ. How often pending that will contest did you see Judge Beardsley there?

Mr. Sherman: Same objection.

A. I do not remember.

133 XQ. Oh, your best recollection of course I am asking for.

A. Oh, I saw him there several times, probably three times.

134 XQ. Is it not a fact that Judge Beardsley was in the habit of coming to Mrs. Fayerweather's house from time to time during the entire will contest?

Mr. Sherman: Same objection.

A. Yes, he came there sometimes, oftener sometimes thon he did others.

135 XQ. Do you know Mrs. Beardsley?

A. Yes, sir.

136 XQ. How long had you been in Mr. Fayerweather's employ prior to his death?

A. How long?

137 XQ. Yes. A. About five years I think it was.

138 XQ. And in that period of that time did you ever see at the house Miss Emma Fayerweather?

F. 1917 A. No, sir I do not think I did.

139 XQ. Did you in that period of time see Mrs. Beardsley. A. Yes, sir.

140 XQ. Is it not a fact that Mrs. Beardsley was a frequent visitor at the house?

A. Yes, sir.

141 XQ. And from your observation, from what you observed, were not the relations between Mr. Fayerweather and Mrs. Beardsley of an affectionate and cordial character?

A. No more so than any one else around the house that I saw.

142 XQ. No more so than his wife?

A. Nor his sister-in-law.

F. 1918 143 XQ. No more so than Mrs. Reynolds?

A. Mrs. Reynolds at present.

144 XQ. But apparently the same affectionate relations as between him and Mrs. Reynolds, is that so?

A. And Mrs. Fayerweather.

145 XQ. And Mrs. Fayerweather?

A. Yes, sir.

146 XQ. Now can you tell me how often Mrs. Beardsley was in the habit of coming to the house?

A. Why, some weeks she would come down once a week, sometimes once a month, sometimes she did not come down for a couple of months.

147 XQ. Was it her habit to come to the house?

Mr. Sherman: Same objection, and the objection in addition that this is not cross-examination of any matter spoken of in chief, and that being so it is independent and substantive affirmative evidence in the cause whereby the defendants adopt the witness as their own witness and adopt his testimony as affirmative evidence in the cause, which is evidence at large and has no relation to the question of *res adjudicata*, and thereby overrule their plea, whereas they have on file no pleading under which they can take any
F. 1919 benefit therefrom.

(At the request of the witness, question No. 147 was repeated by stenographer.)

148 XQ. Was it her habit to come to the house whenever she came to the City of New York so far as you know?

A. So far as I know.

149 XQ. Do you know when it was that the will contest was settled?

A. When it was settled.

150 XQ. Yes. A. I do not, sir.

151 XQ. How long did you remain in the Fayer-
F. 1920 weather family as a butler after the death of Mr. Fayerweather?

A. A little over a year.

152 xQ. A little over a year? A. Yes, sir.

153 xQ. Where did you go then?

A. Where did I go?

154 xQ. Yes.

A. I stayed here in New York.

155 xQ. But where did you go to work?

A. I did not do any work—oh, that summer—I left Mrs. Fayerweather in June, the 27th of June; I did not do anything that summer at all, I went up to

White Plains and spent the summer there with my sister and brother-in-law.

156 xQ. How far did Doctor Vedder live from the Fayerweather home in 57th street?

A. Dr. Vedder lived in 62nd street.

157 xQ. 62nd street?

A. I think that is the street it is, 62nd street, corner of 62nd street and Madison avenue.

158 xQ. And that was also Dr. Wilcox's address?

A. Yes, sir.

F. 1921 159 xQ. Who besides Dr. Vedder, Mr. Fayerweather's doctor?

160 xQ. Who besides Dr. Vedder took care of Mr. Fayerweather?

A. Not anyone to my knowing.

161 XQ. Well, who was his nurse?

A. I was his nurse.

162 XQ. You were his nurse? A. Yes, sir.

163 XQ. Did Mrs. Reynolds have anything to do with his care?

A. She used to assist me sometimes when it was necessary.

164 XQ. And did Mrs. Fayerweather have anything to do with it? A. No, sir.

F. 1922 165 XQ. What?

A. She used to sit with him and sometimes read to him; that is about all she would do.

166 XQ. Sit by his bed and read to him?

A. Yes, sir.

167 XQ. And were you and Mrs. Fayerweather and Mrs. Reynolds and Dr. Vedder the only persons who had anything to do with his care?

A. To my remembrance.

168 XQ. What is it, yes or no?

A. Well, the cnambermaid sometimes might have done something for him.

169 XQ. Who? A. The chambermaid.

170 XQ. The chambermaid?

A. Yes, she might have done some little errands for him but outside of that I do not know of any one else that done anything for him but Mrs. Fayerweather and Mrs. Reynolds and myself.

171 xQ. Your recollection of that is very distinct, is it not? A. Yes, sir.

172 xQ. Quite as distinct as any other fact to which you have testified here?

A. Yes, sir.

F. 1923 173 xQ Do you know Dr. Irwin?

A. Yes, sir.

174 xQ Whose physician was he, Mrs. Fayerweather's?

A. Mrs. Fayerweathers's.

175 xQ. He was not Mr. Fayerweather's doctor?

A. No, sir.

176 xQ. Dr. Vedder was the only one?

A. Yes, sir.

177 xQ. Now during all this period of time prior to Mr. Fayerweather's death on the 15th of November, and throughout the entire period of his last illness, you were in the house and attending to the door with your other duties, were you not?

A. Yes, sir.

178 xQ. So that you would know, would you

F. 1924 not, if any other person came to the house for the purpose of treating Mr. Fayerweather in any way?

Mr. Sherman: Objected to as incompetent, irrelevant and immaterial.

179 XQ. Is not that so? A. Yes, sir.

180 XQ. John, do you remember Dr. V lder calling upon Mr. Fayerweather and seeing him about noon of the 15th of November?

A. I do.

181 XQ. You recollect his coming? A. Yes, sir.

182 XQ. You also recall that he came in the evening, do you not?

A. Yes, sir.

183 XQ. Were you in the room in the morning when Dr. Vedder was with him?

A. No, sir, I was not.

184 XQ. You were not there? A. No, sir.

185 XQ. So that you do not know what transpired between Dr. Vedder and Mr. Fayerweather?

F. 1925 A. I do not, sir,

186 XQ. Were you present, John, in the afternoon of that day when Mr. Fayerweather signed a paper?

A. No, sir.

187 XQ. And so you are not able to tell us what occurred at that time?

A. Not what occurred upstairs.

188 xQ. Well, Mr. Fayerweather was not downstairs that day, was he? A. No, sir.

189 xQ. Is it your recollection that there were many callers at the house on that day, the 15th?

A. There were several callers there.

190 xQ. And did they keep you pretty busy

F. 1926 at the door? A. Yes, sir.

191 xQ. During the last illness of Mr. Fayerweather there were frequent visitors at the house, were there not? A. Yes, sir.

192. xQ. And your duties in attending to the door kept you pretty closely confined there, did they not?

A. Yes, sir.

193 xQ. And that was particularly so on the last day?

A. Yes, sir.

194 xQ. And in attending to that door where was it your habit to sit, downstairs or upstairs?

A. Well, I was generally upstairs in the dining-room or in the pantry.

195 xQ. On what floor of the house is the dining-room?

A. On the first floor.

Mr. Sherman: This is a high stoop house?

The Witness: Yes, sir, it was a high stoop house.

196 XQ. That is the floor right off the stoop?

A. Yes, sir.

197 XQ. And above the basement?

A. Yes, sir.

198 XQ. Now Mr. Fayerweather's room was on
F. 1927 the floor above that? A. Yes, sir.

199 XQ, You call that the second floor?

A, Yes, sir,

200 XQ. So you would be sitting there in the butler's pantry or in the dining-room?

A. I would be working and attending to my duties up on that floor.

201 XQ. John, do you recall what time it was that Dr. Vedder was there in the morning, what time he came?

A. Well, I do not know just the hour that he came that morning, but he was in the habit of coming between nine and ten o'clock, I think.

202 XQ. But on that day can you tell me what
F. 1928 hour it was he came to the house?

A. I cannot tell you the exact hour. sir.

203 XQ. You received him? A. I did.

204 xQ. But your recollection is not sufficiently distinct to say what hour it was?

A. I cannot.

205 xQ. Who was it that during his last illness administered to Mr. Fayerweather's food?

A. I did.

206 xQ. Anybody else? A. Mrs. Reynolds.

207 xQ. Anybody else?

A. Not that I know of.

208 xQ. Well, you say you and Mrs. Reynolds.

Was there any division of the time at which times you gave him his food and she gave him his food?

A. No, sir; I generally prepared his food and sometimes I would be busy or have something else to do and I would take the tray up and Mrs. Reynolds would see that he had his food, but if I was not busy or otherwise occupied why I would sit with him until he took it.

209 xQ. You would take it up? A. Yes, sir.

210 xQ. And then Mrs. Reynolds would take
F. 1929 it in to him in his bed-room?

A. No, sir, I would take in myself.

211 xQ. Would you take it in yourself?

A. Yes, sir.

212 xQ. And leave it there? A. Yes, sir.

213 xQ. And she would wait on him?

A. Yes, sir.

214. xQ. And you would then go downstairs and attend to your duties in the pantry and at the door?

A. Yes, sir.

215 xQ. But the act of administering his food to him would be attended by Mrs. Reynolds, would it not?

A. Well, sometimes it would.

216 xQ. Do you remember Mr. Grout coming
F. 1930 to the house on that day?

A. Yes, sir.

217 xQ. What time of the day was that?

A. I think it was somewhere around three o'clock, between three and four.

218 xQ. Between three and four, is that your recollection? A. Yes, sir.

219 xQ. Who was with him?

A. Mr. Vaughan was with him?

220 xQ. Who else? A. I do not remember.

221 xQ. Well, there was somebody else with him, was there not?

A. I do not know, I cannot remember whether anybody else was with him or not.

222 XQ. Do you mean by that that your recollection is not sufficiently distinct to say whether there was or was not any one with him?

A. Yes, sir.

223 XQ. You do recall Mr. Grout?

A. Yes, sir.

224 XQ. And you do recall Mr. Vaughan?

A. Yes, sir.

F. 1931 225 XQ. They came together?

A. Yes, sir.

226 XQ. When they came to the door you received them?

A. Yes, sir.

227 XQ. What did you do?

A. Asked them in the parlor.

228 XQ. And then what did you do?

A. I reported it upstairs.

229 XQ. Go ahead.

A. And I was told to send them up.

230 XQ. By whom?

A. By Mrs. Reynolds, I think, I am not sure whether it was Mrs. Reynolds or Mrs. Fayer-

F. 1932 weather.

321 XQ. You are positive it was one or the other of those two ladies?

A. Yes, sir.

232 xQ. Did you announce the fact of their coming to anyone else? A. No, sir.

233 xQ. In what room was that?

A. In the front room.

234 xQ. Was Mr. Fayerweather there?

A. No, sir.

235 xQ. You are positive it was not in the back room where Mr. Fayerweather was?

A. No, sir.

236 xQ. The two ladies were together when you announced the arrival of these gentlemen?

A. I do not remember whether they were or not, sir.

237 xQ. Are you able to say that you told either of them, John?

A. I am able to say I pronounced it, but which I pronounced it to I cannot say.

238 xQ. You told one or the other?

A. Yes, sir, I told one or the other, and
F. 1933 whichever one I told was in the sitting-room.

239 xQ. And whether the other lady was present you are not able to say?

A. I am not able to say, sir.

240 xQ. Now when you did make that announcement what response was made and what were you told to do?

A. They told me to send them up.

241 xQ. Send them up?

A. Yes, sir.

242 xQ. And you did so?

A. I did.

243 xQ. Where was Miss Lizzie Joyce at that time?

A. I think she was upstairs.

F. 1934 244 xQ. Where?

A. I could not say, sir.

245 xQ. Did you see her when you went up to announce them?

A. I do not remember seeing her upstairs, I know she was in the house but whereabouts in the house I could not say.

246 xQ. How long, John, had she been at the house at that time?

A. Prior to the time that these gentlemen called?

247 xQ. Yes.

A. Oh, she had been there several days, probably a week.

248 xQ. And is your recollection sufficiently distinct to tell me how long she remained after the 15th?

A. No, sir, it is not, I could not say.

249 xQ. Was Judge Beardsley at Mr. Fayerweather's house on the 15th?

A. Yes, sir.

250 xQ. What time in the day?

A. He was there that night, I do not know what time in the day he came, I do not remember what time in the day he came but he was there when

F. 1935 Mr. Fayerweather died, I do not think he got down until the evening, I am not sure.

251 xQ. Is it not a fact that Judge Beardsley was there at the dinner hour?

A. I do not remember.

252 xQ. Was his wife there?

A. No, sir.

253 xQ. Do you know if he saw Mr. Fayerweather that night?

A. He was there when he died.

254 XQ. In the room with him?

A. He was upstairs at the time of his death.

255 xQ. But you do not know whether he was in the room or not?

F. 1936 A. I do not, I guess he saw him before he retired.

256 xQ. But you are not able to tell me whether Judge Beardsley was there in the morning?

A. I do not think that he was.

257 xQ. When you told the gentlemen, Mr. Grout and and Mr. Vaughan, to go upstairs did you go upstairs with them?

A. No, sir.

258 XQ. What is your recollection as to how long they remained upstairs?

A. I have not any recollection upon that matter at all because I do not know how long they remained.

259 XQ. Well, whatever length of time it was did you go upstairs while they were there?

A. While they were there?

260 XQ. Yes.

A. I do not think I did.

261 XQ. Did you let them out when they came down?

A. No, sir, I do not remember doing so.

262 XQ. You do not remember doing that?

F. 1937 A. No, sir.

263 XQ. So that at what time these gentlemen went into Mr. Fayerweather's room and what transpired there you have no knowledge of whatever, John?

A. Not at all.

264 XQ. John, were you in Mr. Fayerweather's room about six o'clock in the evening of the 15th of November?

A. About six o'clock.

265 XQ. Yes.

A. I cannot say that I was in there just about that time, but I have been in there during the afternoon.

266 XQ. Were you in court when Mrs. Reynolds testified in the case of Amherst against Ritch? Did you hear her testify upon the stand?

F. 1938 A. I do not remember.

267 XQ. Do you remember her speaking of their attempt to put Mr. Fayerweather in the chair on that night?

A. Of whose putting him in the chair?

268 XQ. Of Mrs. Reynolds and some others, with a view of airing the room, and that Mr. Fayerweather fainted; do you recollect any such thing?

A. No, sir.

269 XQ. Do you recall whether or not Mr. Fayerweather was put in his rolling chair that night?

A. No, sir.

270 XQ. Not while you were there?

A. He was not put in the chair at all.

271 XQ. Well you are testifying of course of matters to your knowledge?

A. To my knowledge.

272 XQ. And your knowledge while you were there?

A. Yes, sir.

273 XQ. And in any answers that you have given to any questions, John, you only mean to be understood as testifying to matters which came under your personal observation?

F. 1939 A. Yes, sir.

274 xQ. John, how many other domestics were there in the home at that time?

A. I think there were three others besides myself.

275 xQ. A cook?

A. And chambermaid.

276 xQ. And a waitress?

A. No, there was only two others, we hired the laundress by the day.

277 xQ. A cook and waitress?

A. No, a cook and chambermaid and myself, there was only three of us.

278 xQ. And the laundress was brought in by the day?

A. Yes, sir.

F. 1940 279 xQ. John, has your occupation always been that of butler?

A. Butler and valet, sir.

280 XQ. You would hardly consider yourself a trained nurse, would you?

A. No, sir.

281 xQ. You have never had any experience as a trained nurse, have you?

A. No, sir.

282 xQ. Who was Mr. Fayerweather's coachman?

A. A man by the name of Ben Dietz.

283 xQ. Ben Dietz?

A. Yes, sir.

284 xQ. How long had he been in his employ?

A. Why I understood when I went there that he had been there five years prior to my going there, four or five years.

285 xQ. How far was Mr. Fayerweather's stable from the house?

A. Why it was two blocks, I think.

286 xQ. Two blocks?

A. The stable was between Lexington and Third and he lived between Madison and Fifth.

F. 1941 287 xQ. Did the coachman live at 11 East 57th street or at the stable?

A. At the stable; he slept at the stable and ate at the house.

288 xQ. John, were you present in Mr. Fayerweather's room when he signed a paper on the 11th of November?

A. No, sir.

289 xQ. Did you see him in his chair on that day?

A. On the 11th?

290 xQ. Yes.

A. I do not remember seeing him in his chair, sir.

291 xQ. Did you see him in his chair on the 12th?

A. On what?

292 xQ. On the 12th?

F. 1942 A. No, sir.

293 XQ. For two weeks prior to his death did the family dine downstairs in the dining-room?

A. Did the family?

294 XQ. Yes.

A. Yes, sir.

295 XQ. Where did Mrs. Fayerweather sleep?

A. She slept in the second floor extension.

296 XQ. And it was her custom to come down to the dining-room at meals?

A. Sometimes she would and sometimes she would not.

297 XQ. Did that practice continue after the death of Mr. Braxwenthan?

A. Yes, sir.

298 XQ. Do you remember going to Dr. Vedder's house on the 15th of November?

A. Yes, sir.

299 XQ. Except the occasion when you went to Dr. Vedder's house you were in constant attendance upon the door upon that day, were you not?

A. Off and on.

F. 1943 300 XQ. John, were you not asked this question and did you not give this answer when you were examined in the trial before Judge Truax that you have spoken of—

Mr. Sherman: What page is that?

Mr. Bovee: Page 742, direct examination by Colonel James.

301 xQ "Q Was there any part of the afternoon or evening of that day that you were not in attendance on the front door? A. With the exception of when I went up to Dr. Vedder's." You were asked that question and you gave that answer, did you not?

A. Yes, sir.

F. 1944 302 xQ. And that testimony was true, John?

A. Yes, sir.

303 xQ. What time did you say it was that you went to Dr. Vedder's?

A. I think it was between eleven and twelve o'clock or something in that neighborhood?

304 xQ. John, is your remembrance as good now of that fact as it was when you testified in the Truax trial?

A. I think so.

305 xQ. John, were you not asked on that trial by Colonel James this question and did you not give this answer——

Mr. Sherman: What page is that, Mr. Bovee?

Mr. Bovee: The same page, it is the next question to the one I have just read.

306 xQ. And when was that—referring to when you went to Dr. Vedder's "A. Between two and three o'clock." Did you not so testify then?

A. I answered that I went there at that time do you mean?

307 xQ. Yes, didn't you testify that you went between two and three o'clock?

F. 1945 A. Well, if I made that statement it was true.

308 xQ. It was true? A. Yes, sir.

309 xQ. And if you so testified at that time you are in error now in saying it was about twelve?

A. I will admit that I made an error. Of course it has been quite some time and quite a long while to carry those things in your mind.

310 xQ. Your recollection would naturally be better when you testified in the Amherst College case than it would be now?

A. Certainly upon that point.

311 xQ. And so, John, you may very well be mistaken in testifying at this late day as to occurrences which took place in 1890?

F. 1946 A. Well, some I may.

312 xQ. Now, John, how did you go to Dr. Vedder's? A. I walked.

313 xQ. Did you walk? A. Yes, sir.

314 xQ. How long did it take you to go?

A. Oh, anywhere from five to ten minutes.

315 XQ. Your recollection is just as distinct of that fact—

A. Yes, sir just as distinct upon that point.

316 XQ. As to any other point to which you have testified here? A. Yes, sir.

317 XQ. And quite as true, is it not?

A. Yes, sir, just as true.

318 XQ. You are very positive about it? A. I am.

319 XQ. John, when did you say it was that you gave your testimony in the Truax trial?

A. In March, 1899?

320 xQ. March, 1899?

A. Yes, sir.

321 xQ. That was over in the County House over here?

A. I do not know where it was, I am not very familiar with this part of the town.

F. 1947 322 xQ. But you do know it was the Amherst case before Judge Truax?

A. Yes, sir.

323 xQ. And you are sure it was 1899?

A. Yes, sir.

324 xQ. Now, John, were you not asked this question upon this occasion, "Q. How long were you gone?" Referring to your visit to Dr. Vedder's on the 15th of November; and did you not give this answer in response to Colonel James, "A. I suppose about twenty minntes or twenty-five minutes, I rode up and rode back"?

A. I do not remember making that statement, sir.

325 xQ. Well, are you able to recall all the testimony that you did give before Judge Truax?

F. 1948 A. So far as I have gone I can recollect it.

326 xQ. Did you testify before Judge Truax as to all of the facts that you have given testimony upon here in this case?

A. Did I do it?

327 xQ. Yes.

A. I do remember of given but a very little testimony before Judge Truax.

322 xQ. John, if you did so testify before Judge Truax that testimony was not correct; is that right?

Mr. Sherman: Objected to as hypothetical and without any basis, speculative, incompetent and not a proper

mode of proof either of what he testified before or as to the accuracy of his statement now.

(At the request of the witness question 328 was repeated by stenographer.)

A. If I testified then it must be true now.

329 xQ. If you testified then it was true?

A. Yes, sir.

330 xQ. Is that right?

F. 1949 A. Yes, sir.

331 xQ. Because your recollection then was a great deal better than it is now, is that the reason?

A. Upon those points it is.

332 xQ. Between what avenues was it that Dr. Vedder lived?

A. 62nd—oh, what avenues?

333 xQ. Yes.

A. Madison and Fifth.

334 xQ. Those are the avenues between which Mr. Fayerweather lived?

A. Yes, sir.

335 xQ. And Mr. Fayerweather lived in 57th street and Dr. Vedder in 61st street?

F. 1950 A. 62nd street.

336 xQ. You went right up and came right back?

A. Yes, sir.

337 xQ. Well, won't you tell me why it was that it took you twenty minutes or twenty-five minutes to go from 57th street to 61st street?

A. I cannot.

338 xQ. When you went to Dr. Vedder's who did you see?

A. I saw Dr. Vedder, I think.

339 xQ. You are very positive about that, are you not, John?

A Yes, sir.

340 xQ. You know him, too, you know him well?

A. I know Dr. Vedder.

341 xQ. You couldn't be mistaken in the man?

Q. I could not at that time.

342 xQ. Was Dr. Vedder the only person tnat you saw when you went there?

F. 1951 A. I do not remember, sir.

Mr. Bovee: That is all.

Mr. Sherman: Counsel for the complainants ask the Examiner to note the time by a going watch, to note the time when the witness is asked to begin in answer to the question about to be put to him and to note after what passage of time the witness indicates that the count is to stop.

Re-direct examination by Mr. Sherman:

343 RDQ. Mr. Baylor, some people not being able to form an accurate idea of the passage of time, I am going to put to you with your permission, a

F. 1952 practical test. I will ask you when the Examiner says, now to consider the passage of time until you think five minutes have elapsed, and when you think that five minutes have elapsed you say to the Examiner "Stop."

The Examiner: Now.

The Witness: Stop.

(The time elapsed between the Examiner stating "Now" and the witness stating "Stop" was two minutes and fifteen seconds.)

344 RDQ. Did you ever see Mrs. Goodwin?

A. Mrs. Goodwin?

345 RDQ. Yes.

A. Yes, sir.

346 RDQ. Where did you see her?

A. I saw her at 11 East 57th street.

347 RDQ. And more than once?

A. Yes, sir.

348 RDQ. How many times?

A. I couldn't say, sir, how many times.

F. 1953 349 RDQ. Five, ten, twenty or more?

A. I think so, more.

350 RDQ. Was there any particular hour of the day when she usually came?

A. She generally came in the evening.

351 RDQ. And for what purpose so far as you know, did she come?

A. To give Mrs. Fayerweather a massage treatment.

351 RDQ. To give Mrs. Fayerweather?

A. Yes.

353 RDQ. Well, is that your inference? You never saw her give Mrs. Fayerweather massage treatment?

A. No, sir, I never saw her.

F. 1954 354 RDQ. Do you know whether or not she gave Miss Fayerweather massage treatment?

A. I do not.

355 RDQ. When you said in answer to Mr. Bovee that you would know the purpose of persons coming to the house, by what process of reasoning would you know whether Mrs. Goodwin was coming to give massage to Mrs. Fayerweather or Mr. Fayerweather?

A. Because I had been told by the chambermaid that she was coming to give Mrs. Fayerweather massage treatment.

356 RDA. And that is the only source of information you had?

A. Yes, sir.

375 RDQ. And how much the chambermaid knew about it of course you did not know?

A. I did not, sir.

358 RDQ. When you say you were busy at the door do you mean that you had occasion to open it all the time or that you attended to it when the bell rang?

A. When the bell rang?

359 RDQ. And can you undertake to say how many people actually rang the bell on the 15th of F. 1955 November, 1890?

A. No, sir, I cannot.

360 RDQ. Do you remember whether when Dr. Vedder came on the morning of November 15th he came alone or came in with Miss Anner Amelia Joyce?

A. I do not remember distinctly whether he came alone or whether any one came with him.

361 RDQ. Did Miss Joyce go out in the carriage that morning?

A. Not that I remember.

362 RDQ. Was there any custom about having the carriage at the door at any particular hour?

A. No, sir.

F. 1956 363 RDQ. What?

A. Not that I remember.

364 RDQ. How did the coachman get his orders for the carriage?

A. Coming to the house and going upstairs.

355 RDQ. He came every day?

A. Yes, sir.

366 RDQ. Oftener than once a day?

A. Not unless he got particular orders

367 RDQ. When you say that you testified before Judge Truax? in 1889, have you a distinct recollection of the year that you testified before Judge Truax?

A. Yes, it was March, 1899. I have not a thorough

distinct recollection but I have got it from reading papers, I think I have got a strip of the trial at home in my trunk.

368 RDQ. You have recently refreshed your memory by some papers, have you?

A. Yes, sir.

369 RDQ. And are you sure that instead of having refreshed your memory you have not misled your memory?

F. 1957 A. I do not think so.

370 RDQ. Well, were you examined in 1899 by me here in this room?

A. No, sir.

371 RDQ. You were not?

A. I do not think so, I do not remember it.

372 RDQ. (Handing book.) I show you your signature to the deposition filed herein, dated Match 4th, 1889. Is that your signature?

A. Yes, sir.

373 RDQ. Well, does that refresh your memory as to whether you were examined here in this room

F. 1958 by me on the 4th of March, 1899?.

A. I remember it now.

374 RDQ. Well, do you remember whether the time that you were called as a witness before Judge Truax and were examined by Mr, James and your testimony —you gave very little testimony I think you said?

A. Yes.

375 RDQ. Was not that in the County Court House and five or six or seven years ago?

A. I do not remember the date but I can remember the occurrence.

376 RDQ. Well, was it a long time before the occasion when you gave testimony herein?

A. Yes, sir.

377 RDQ. Now when you announced that Mr. Vaughan was downstairs what did you say to Mr. Fayerweather?

A. I said that Mr. Vaughan was in the parlor.

378 RDQ. Is that all you said?

A. Well, that is all I remember; Mr. Vaughan and a gentleman I might have said.

379 RDQ. And what did Mrs. Fayerweather say?

A. She says, "Send him up," or "Show him upstairs."

F. 1959 380 RDQ. And did Mr. Vaughan go up first or did he take the others up first, whoever was with him?

A. I think they went up together, I am not positive.

381 RDQ. I understand that you do not distinctly remember whether Mrs. Fayerweather or Miss Amelia Joyce was in the front room upstairs; is that so?

A. Yes, sir.

382 RDQ. Do you remember that one or the other was in that room then?

A. I remember one being there but which one I do not remember.

Mr. Sherman: I think that is all.

F. 1960

Re-cross-examination by Mr. Bovee:

383 RXQ. John, by whose direction did you go to Dr. Vedder's house on that afternoon?

A. By Mr. Vaughan's.

384 RXQ. Who was present when Mr. Vaughan told you to go?

A. Only him and I.

385 RXQ. What part of the house?

A. I was going upstairs and Mr. Vaughan was in the hall between the sitting room and Mr. Fayerweather's.

386 RXQ. Yes.

A. The bell rung and I answered it, and as I came upstairs, he says "What is your name?" or "Who is that, John?" and I says yes, and he gave me the message.

387 RXQ. This was in the room between Mr. Fayerweather's room——

A. No, sir; it was in the hall between Mr. Fayerweather's room and the sitting room.

388 RXQ. Did that hall way open into the room where Mr. Fayerweather was?

F. 1961 A. Yes, sir.

389 RXQ. Did it open into the front room?

A. Yes, sir.

390 RXQ. Mrs. Fayerweather was in the front room, was she not?

A. I do not know, sir.

391 RXQ. Was Miss Joyce there?

A. I do not know, sir.

392 RXQ. You had seen them there, had you not?

A. Sir?

393 RXQ. Had you not seen Mrs. Fayerweather and Miss Joyce in the same room?

A. I do not remember seeing them there, I did not get all the way upstairs.

F. 1962 394 RXQ. How long before that time had you been upstairs?

A. I do not remember how long before that. I had not been up to my remembrance since I pronounced their being there, I pronounced his coming, I do not remember going up before or since then.

895 RXQ. Was that after Mr. Grout had come?

A. That was before Mr. Grout had come.

396 RXQ. Before Mr. Grout had come?

A. Yes, sir.

397 RXQ. Now who was it that you had announced to Mrs. Fayerweather?

A. I think I had pronounced Mr. Vaughan before

that, I think he was there in the morning, this was in the morning.

398 RXQ. This was in the morning that you are now speaking of, not on the occassion when Mr. Grout and Mr. Vaughan came?

A. No, this was in the morning.

399 RXQ. But on another visit by Mr. Vaughan?

A. By Mr. Vaughan and Mr. Grout.

400 RXQ. Another occasion when Mr. Vaughan came alone in the morning, is that it?

F. 1963 A. Yes, sir.

401 RXQ. You received Mr. Vaughan on that occasion?

A. Yes, sir.

402 RXQ. What time of the day was that?

A. I do not remember just the time it was, it was somewhere around eight or nine o'clock or it might have been a little later.

403 RXQ. And are you able to tell me who announced Mr. Vaughan's coming to at that time?

A. I think it was Mrs. Reynolds.

404 RXQ. And not Mrs. Fayerweather?

A. I do not think so.

405 RXQ. Who was present with Mrs. Reyn-

F. 1964 olds?

A. I do not remember any one being present.

406 RXQ. Doctor Vedder?

A. I do not think so.

407 RXQ. How long did Mr. Vaughan remain there at that time?

A. Well, I do not remember exactly how long he remained, but I remember seeing him go out.

408 RXQ. In any event Dr. Vedder did not come while Mr. Vaughan was there at that time?

A. Not to my remembrance.

409 RXQ. That was between about nine and ten o'clok?

A. I think so.

410 RXQ. Mr. Vaughan remained about how long?

A. I do not remember exactly how long; but I remember seeing him go out, I was doing my work in the front when he came out, when he went out.

411 RXQ. Well, is it your recollection that he remained an hour?

A. Well, about.

412 RXQ. About an hour? A. Yes, sir.

413 RXQ. And in all that time Dr. Vedder did not come there?

F. 1965 A. Not to my remembrance.

414 RXQ. And as you came upstairs, and while Mr. Vaughan was still there, you say he met you in the hall and told you to go to Dr. Vedder's?

A. Yes, sir.

415 RXQ. Is that right?

A. He called me and I answered him.

416 RXQ. And he told you to go to Dr. Vedder's?

A. Yes, sir.

417 RXQ. Now, when Mr. Vaughan told you that, did he raise his voice or speak in the ordinary tone of voice?

A. The ordinary tone.

F. 1966 418 RXQ You understand that he had come from the front room where Mrs. Fayerweather and Miss Joyce were, did you not?

A. I do not know where he came from, he was standing there.

419 RXQ. Now that was the only instruction that you received in respect to your going to tell Dr. Vedder?

A. From whom?

420 RXQ. Mr. Vaughan.

A. Yes, sir.

421 RXQ. And that message was to tell Dr. Vedder he need not come down, is that right?

A. Yes, sir.

422 RXQ. And that is the only instruction that you received from anybody in respect to telling Dr. Vedder not to come down, is that right?

A. That is so.

Mr. Bovee: That is all.

By Mr. Sherman:

423 RDQ. Mr. Baylor, Dr. Vedder was at the F. 1967 house about eleven o'clock, was he, on that day?

A. Between ten and eleven.

Mr. Bovee: I object to the question as leading.

Mr. Sherman: Is there any dispute about it.

424 RDQ. When was Dr. Vedder at the house that morning?

A. He was there between nine and eleven o'clock.

425 RDQ. Was he there twice that morning?

A. Not that I remember.

426 RDQ. Was it before or after Dr. Vedder was at the house that you received this direction from Mr. Vaughan to go and tell him not to come?

A. Well, it was before or after. I do not re- F. 1968 member whether it was before or after.

427 RDQ. But you saw Dr. Vedder, you think, at his house?

A. Yes, sir.

428 RDQ. And did you know that he was in the habit of coming every morning to the house?

A. Yes, sir.

429 RDQ. Did Mr. Vaughan know that Dr. Vedder was in the habit of coming every morning to the house?

A. Well, that I could not say, sir.

430 RDQ. Did you tell Mr. Vaughan when he gave you those instructions that it was about time for Dr. Vedder to come to the house on his regular visit?

A. *I do not remember.*

431 RDQ. Did Miss Anner Amelia Joyce tell Mr. Vaughan that it was unnecessary to send any such message because Dr. Vedder was due to arrive there at any moment?

A. Not that I know of.

432 RDQ. You did not hear any such statement from her?

A. No, sir.

F. 1969 433 RDQ. Just what did Mr. Vaughan say to you in giving the instructions?

A. He told me to go up and say to Dr. Vedder or Dr. Wilcox that their services would not be needed that afternoon at three o'clock.

434 RDQ. He did not say that their services, that Dr. Vedder's services as an attending physician would not be required that day, did he?

A. No, sir.

435 RDQ. Did you see Dr. Vedder when he came down to the house that morning?

A. Yes, sir.

F. 1970 436 RDQ. Well, and you let him in, did you?

A. Yes, sir.

437 RDQ. And when you let him in did you remember that you had previously told him not to come?

A. I do not remember.

438 RDQ. Well, if you had previously told him not to come and he then came on his regular visit do you not think it would have made some impression on your mind as an unusual occurrence?

Mr. Bovee: I object to the question as incompetent and speculative and calling for the opinion and conclusion of the witness and hypothetical and

irrelevant and immaterial to the issues presented upon the special pleas.

(At the request of the witness, question No. 438 was repeated by stenographer).

A. I would.

439 RDQ. What is your best recollection upon having your attention called to the sequence of events by my preceding questions, as to whether you went

F. 1971 to Dr. Vedder's house before or after his morning visit?

A. My best recollection is that I went there afterwards.

440 RDQ. And have you a clear recollection as to the precise hour of the day afterwards when you went there?

A. I think it was somewhere——well, I think it was somewhere between eleven and twelve o'clock that I went up to Dr. Vedder's.

441 RDQ. Well, did Mr. Vaughan on the morning visit leave the house deliberately or in haste?

A. He left very in haste.

F. 1972 442 RDQ. Well, was it while he was departing in haste that he told you to go to Dr. Vedder's house?

A. It was just before he left when he called me up and told me to take the message.

By Mr. Bovee:

443 RDQ. Did you see Mr. Vaughan with Miss Joyce on that visit?

A. Sir?

444 RDQ. Was Mr. Vaughan with Miss Joyce on that visit at all?

A. Not that I know of.

445 RDQ. Did you see him with Mrs. Fayerweather?

A. Not that I know of.

Mr. Bovee: I think that is all.

Mr. Sherman: That is all.

Mr. Bovee: Of course, Mr. Sherman, I understand you to say that is the end of the depositions
F. 1973 except Prescott Hall Butler?

Mr. Sherman: Oh, no, I do not say that, I had not intended to be understood in that way, I think I mentioned that I would read Mr. Ritch's in.

Mr. Bovee: There were several others in the testimony.

Mr. Sherman: I will tell you what I will not read so far as I am at present advised—of course I do not mean to be bound by this, I am simply giving you a suggestion to the best of my ability at this time. I do not think it will be necessary to examine Mr.
F. 1974 Blaikie or Miss Joyce or Mr. Laux or Doctor Lloyd or Thomas Marsac except as he has been examined here; and I expect to read Mr. Ritch's deposition. That appears to cover it.

Mr. Bovee: Then it is only Ritch and Butler.

Mr. Sherman: I think so out of this book.

Mr. Bovee: I mention the fact only because you have previously said that you would read all of those that you have not excepted.

Mr. Sherman: I think I have covered them in other ways.

Signed,

JOHN C. BAYLOR.

Signed and sworn to before me this 23d day of April, 1901.

F. 1975 JOHN A. SHIELDS,

Examiner.

Adjourned to February 25th, 1901, at 10:30 a. m.

F. 1976

COMPLAINANTS' PROOFS.

NEW YORK, February 25th, 1901.

Met pursuant to adjournment.

Present: The Examiner, Mr. Sherman, Mr. Blaikie, Mr. Bovee, Mr. Carnochan, Mr. Fain, a representative of Root, Howard, Winthrop & Stimson, and representative of Russell & Holmes

Qbjections to questions asked *PRESCOTT HALL BUTLER* in the Hamilton College Record.

Mr. Bovee: Counsel for the defendants object to the introduction of the testimony of the witness Prescott Hall Butler given upon the Hamilton College plea as incompetent, unauthorized, illegal and unprecedented, and insist that the witness
F. 1977 shall be produced and examined in the regular way in this proceeding. Counsel for the the defendants were not parties to the proceedings in which the testimony was given and had no power or right to cross-examine in that case.

Defendants object to question 11 as irrelevant and immaterial to the issues presented upon the special pleas, and as incompetent, and calling for the conclusion of the witness in violation of Section 835 of the Code of Civil Procedure of the State of New York, calling for information acquired by the witness in his professional capacity as attorney and counsel.
F. 1978

Defendants object to question 14 as irrelevant and immaterial to the issues presented by the special pleas, as incompetent, calling for the conclusion of the witness, and a violation of Section 835 of the Code in calling for a disclosure of matters learned by the witness in his professional capacity.

The same objection to question 15.

Defendants object to question 16 as improper in form, incompetent, irrelevant and immaterial to the issues presented upon the special pleas, incompetent in calling for matters learned by the witness in his capacity as attorney and counsel.

The same objection to question 17.

Same objection to question 18.

Defendants object to question 19 as irrelevant and immaterial to the issues presented upon the special pleas, and incompetent.

Defendants object to question 20 as irrelevant and immaterial to the issues presented upon the special pleas, and calling for the opinion and conclusion of the witness, and incompetent.

F. 1979

Defendants object to question 26 as incompetent, and irrelevant and immaterial to the issues presented upon the special pleas.

Same objection to question 27.

Same objection to question 28.

Same objection to question 29.

Same objection to question 30.

Same objection to question 31.

Same objection to question 32.

Same objection to question 33.

F. 1980 Same objection to question 34.

Defendants object to question 35 as irrelevant and immaterial to the issues presented upon the special pleas, as incompetent and a violation of Section 835 of the Code of Civil Procedure in calling upon the witness to testify as to matters which came to his knowledge through his professional relation with Mr. Fayerweather.

Same objection to question 36.

Defendants object to question 37 as improper in form and leading, irrelevant and immaterial

to the issues presented on the special pleas, and as incompetent, in violation of Section 835 of the Code of Civil Procedure.

Same objection to question 38.

Same objection to question 39.

Same objection to question 41.

Same objection to Question 42.

Same objection to Question 46.

Same objection to question 47.

F. 1981 Same objection to Question 48.

Same objection to Question 53.

Adjourned to February 26th, 1901, at 10:30 a. m.

COMPLAINANTS' PROOF.

NEW YORK, February 26th, 1901.

F. 1982 Met pursuant to adjournment. Present:—The Examiner, Mr. Blaikie, Mr. Bovee, a representative of Nash & Jones, and a representative of Messrs. Root, Howard, Winthrop & Stimson.

Mr. Bovee: I will continue my objections to the testimony of Prescott Hall Butler in the Hamilton College record.

Defendants object to Question 56 as irrelevant and immaterial to the issues presented upon the special pleas,

Same objection to question 57.

Defendants object to question 59 as improper in form and leading, irrelevant and immaterial to the issues presented upon the special pleas, and incompetent.

Same objection to Question 60.

Defendants object to Question 61 as irrelevant and immaterial to the issues presented upon the special pleas, and incompetent.

Defendants object to Question 65 as irrelevant
F. 1983 and immaterial to the issues presented upon the special pleas, and incompetent.

Defendants object to question 81 as irrelevant and immaterial to the issues presented upon the special pleas, and incompetent, in violation of Section 835 of the Code of Civil Procedure of the State of New York.

Same objection to question 82.

Defendants object to question 125 as improper in form and leading, irrelevant and immaterial to the issues presented upon special pleas, incompetent, calling for the opinion and conclusion of the witness, calling for the contents of a written paper
and in violation of Section 835 of the Code of
F. 1984 Civil Procedure, calling for information acquired by the witness in his professional capacity.

Defendants object to question 126 as improper in form and leading, assuming facts not proven, as irrelevant and immaterial to the issues presented upon the special pleas, and as incompetent, in violation of Section 835 of the Code of Civil Procedure of the State of New York, calling upon the witness to testify to matters learned by him in his professional relation to the deceased.

Same objection to question 127.

Same objection to question 129.

Same objection to question 130.

Same objection to question 131.

Same objection to question 133.

Defendants object to question 134 as irrelevant and immaterial to the issues presented upon the special pleas, as incompetent, calling for contents of a written paper, and in violation of
F. 1985 Section 835 of the Code of Civil Procedure, calling upon the witness to disclose information acquired by him in his professional capacity as lawyer for the deceased, Daniel B. Fayerweather.

Defendants object to question 135 as irrelevant and immaterial to the issues presented upon the special pleas, and incompetent.

Same objection to question 136.

Defendants object to question 137 on the same grounds.

Same objection to question 138.

Defendants object to question 139 as irrelevant and immeterial to the issues presented upon the special pleas, and incompetent, and calling for the opinion and
F. 1986 conclusion of the witness.

Defendants object to question 142 as improper in form, hypothetical, irrelevant and immaterial to the issues presented upon the special pleas, and incompetent.

Defendants object to Question 143 as irrelevant and immaterial to the issues presented upon the special pleas, and incompetent, calling for the opinion and conclusion of the witness, in violation of Section 835 of the Code of Civil Procedure.

Same objection to question 144.

Same objection to question 145.

Defendants object to question 146 as irrelevant and

immaterial to the issues presented upon the special pleas, and incompetent.

Defendants object to question 151 as irrelevant and immaterial to the issues presented upon the special pleas, and incompetent.

Defendants objection to question 155 as irrelevant and immaterial to the issues presented upon the special pleas, and incompetent.

F. 1987 Same objection to question 156.

Defendants object to question 157 as irrelevant and immaterial to the issues presented upon the special pleas, and incompetent.

Defendants object to question 162 as irrelevant and immaterial to the issues presented upon the special pleas, incompetent, in violation of Section 835 835 of the Code of Civil Procedure calling upon the witness to disclose matters learned by him from his professional relation of attorney to Mr. Fayerweather.

Defendants object to question 164 as irrelevant and immaterial to the issues presented upon the
F. 1988 special pleas, incompetent, in violation of Section 835 of the Code of Civil Procedure, calling upon the witness to testify as to matters learned by him in his professional capacity as attorney for Daniel B. Fayerweather.

Same objection to question 166.

Same objection to quession 167.

Same objection to question 169.

Defendants object to question 170 as improper in form and leading, incompetent, calling for the contents of a written paper, in violation of Sec-

tion 835 of the Code of Civil Procedure, calling upon the witness to testify to matters learned by him in his professional capacity of attorney to D. B. Fayerweather, and irrelevant and immaterial to the issues presented upon the special pleas.

Defendants object to question 171 as irrelevant and immaterial to the issues presented upon the special pleas, incompetent, and hypothetical.

F. 1989 Defendants object to question 172 as irrelevant immaterial and incompetent.

Defendants object to question 173 as irrelevant, immaterial and incompetent.

Defendants object to question 174 as irrelevant and immaterial to the issues presented upon the special pleas, as incompetent, in violation of Section 835 of the Code of Civil Procedure, calling upon the witness to testify to matters learned by him in his professional capacity of attorney.

Defendants object to qnestion 178 as irrelevant and immaterial to the issues presented upon the special pleas, as incompetent, calling for the opinion and conclusion of the witness in violation of Sec-

F. 1990 tion 835 of the Code of Civil Procedure.

Same objection to question 179.

Defendants object to question 180, as improper in form, as irrelevant and immaterial to the issues presented upon the special pleas, as incompetent, calling for the opinion and conclusion of the witness.

Same objection to question 183, and upon the further ground that it is a violation of Section 835 of the Code of Civil Procedure, calling upon the witness to disclose matters learned by him in his capacity as attorney.

Defendants object to question 184 as irrelevant and immaterial to the issues presented upon the special pleas, and incompetent.

Defendants object to question 185 as irrelevant and immaterial to the issues presented upon the special pleas, incompetent, and calling for the opinion and conclusion of the witness.

Defendants object to question 189 as irrelevant and immaterial to the issues presented upon the spe-
F. 1991 cial pleas, as incompetent, calling upon the witness to disclose matters learned by him in his capacity as attorney to Mr. Fayerweather in violation of Section 835 of the Code of Civil Procedure.

Same objection to question 190.

Defendants object to question 192 as irrelevant and immaterial to the issues presented upon the special pleas, incompetent, calling for the opinion and conclusion of the witness as to the effect of a written instrument or instruments, and in violation of Section 835 of the Code of Civil Procedure.

Defendants object to question 212 as irrelevant and
F. 1992 immaterial to the issues presented upon the special pleas, incompetent, calling for matters learned by the witness in his professional capacity, in violation of Section 835 of the Code of Civil Procedure.

Defendants object to question 219 as irrelevant and immaterial to the issue presented upon the special pleas, and incompetent.

Defendants object to question 247 as irrelevant and immaterial to the issues presented upon the special pleas, and incompetent, in violation of Section 835 of the Code of Civil Procedure.

Same objection to question 248.

Same objection to question 249.

Defendants object to question 265, which is as follows: "I ask you to state the contents of that paper," upon the ground that it is irrelevant and immaterial to the issues presented upon the special pleas, as incompetent calling for the contents of a written paper, and in violation of Section 835 of the Code of Civil Procedure, calling for a disclosure by the witness of matters learned by him in his professional capacity as attorney for Mr. Fayerweather.

F. 1993 That concludes the Butler deposition.

Adjourned to Thursday, February 28th, 1901, at 10:30 a.m.

COMPLAINANTS' PROOF.

NEW YORK, February 28th, 1901.

F. 1994 Met pursuant to adjournment. Present: The Examiner, Mr. Sherman, Mr. McLaughlin, and a representative of Mr. Bovee, a representative of Nash & Jones, and a representative of Messrs. Root, Howard, Winthrop and Stimson.

Adjourned to March 4th, 1901.

NEW YORK, March 4th, 1901.

Met pursuant to adjournment Present:

The Examiner, Mr. Blaikie, Mr. Bovee, a representative of Butler, Notman, Joline & Mynderse, a representative of Nash & Jones, and a representative of Root, Howard, Winthrop & Stimson.

Mr. Blaikie: Counsel for complainants offers in evidence certified copy of the letters testamentary of John B. Reynolds as sole executor of the last
F. 1995 will and codicil of Lucy Fayerweather, deceased, and asks to have it marked as an exhibit for complainants.

Mr. Bovee: What is that, Mr. Blaikie?

Mr. Blaikie: A certificate of the Surrogate's Court of the fact that letters testamentary were duly granted to Mr. Reynolds.

Mr. Bovee: It is not a copy of the letters?

Mr. Blaikie: No, it is the ordinary certificate that letters have been issued.
F. 1996 The paper was marked Complainant's Exhibit No. 1, March 4th, 1901, C. B.

(See Appendix of Exhibits No. 54).

Mr. Blaikie: Counsel for complainants reads into the record the testimony of Thomas G. Ritch, a witness called in the Hamilton College case, commencing at page 147 of the original stenographer's minutes, and in the printed copy of the record in that case, commencing at page 110.

Testimony of Thos. G. Ritch in Hamilton College Record.

F. 1997

Direct examination by Mr. Sherman:

THOMAS G. RITCH, called as a witness on behalf of the complainants, being duly sworn, testified as follows:

1 Q. (Handing book.) I will ask you to look at what purports to be a receipt from the Surrogate's Records for the will and codicils of Daniel B. Fayerweather, deceased, and ask you whether you recognize the handwriting of the receiptor?

A. Yes, it is the handwriting of a clerk, a F. 1998 clerk of the firm.

By Mr. Blaikie:

2 Q. Of Arnoux, Ritch & Woodford? A. Yes.

By Mr. Sherman:

3 Q. What is the name of the clerk?
A. Mr. MacArthur.

4 Q. Give his full name, please.
A. John R. MacArthur.

5 Q. Was he authorized to sign the name of Arnoux, Ritch and Woodford to the receipt?

A. If he received the will he was.

6 Q. Have the will and codicils been in your possession since that receipt?

A. I have made inquiries about it since I was here and the information that I got was that it was taken from the Surrogate's office and then returned.

7 Q. Have the will and codicils been in your possession since that receipt?

A. I have not seen the will or codicils, any of the codicils, for years.

F. 1999 8 Q. Have the will and codicils been in your possession since that receipt?

A. I don't know.

9 Q. Have you been in this room before the occasion when you were sworn this morning?

A. Only as I was here this morning.

10 Q. And then you went away again and obtained the information you now give?

A. Yes.

11 Q. Did you state at that time when you were here previous to this to-day that if the will and codicils were in your possession they were in a locked box to which Mr. Bulkley had another key, that Mr. Bulkley would be out of town, probably, until Monday,

F. 2000 and that it would be necessary for both of you to use your keys in order to open that box, or did you state that in substance?

A. I stated that in substance. Since then I have made inquiry and have been told that they were not in the box.

12 Q. You have not looked in the box since making this statement, have you?

A. I have not.

13 Q. Mr. MacArthur is Mr. Stewart L Woodford's son-in-law, is he not?

A. No, sir.

14 Q. What relation is he to Mr. Woodford?

A. None. He was his secretary when he was at Madrid.

15 Q. Is he related to any member of your firm by blood or marriage?

A. No present member of the firm. He is a son-in-law of Mr. Arnoux, who left the firm in January, 1886.

16 Q. Is Mr. MacArthur now employed by your firm?

A. He is not.

F. 2001 17 Q. Do you know where he can be found?

A. Hotel Continental, Paris.

18 Q. By whom were you informed that the codicils and will were returned to the Surrogate's office after the date of that receipt?

A. I was told by Mr. Myrick, who is the clerk of the trustees; he said that was his impression and belief.

19 Q. Did he tell you who had taken them to the Surrogate's office last?

A. He did not.

20 Q. You will not yourself swear that they are not in that box you spoke of this morning?

A. No, sir; I will not. I was only subpœ-

F. 2002 naed at 9:30 this morning, and I have had no opportunity to make a search.

21 Q. When will you be able to make such a search as will enable you to state whether the will and codicils are in that box which you refer to?

A. On Tuesday.

22 Q. What time Tuesday?

A. Whenever Mr. Bulkley can go with me.

23 Q. Will you at the earliest opportunity make such a search and attend here at two o'clock on Tuesday and state the result of it?

A. Yes, if it is desired.

24 Q. Did Mr. Myrick tell you who it was that had

taken these papers back to the Surrogate's office or what his impression was as to who it was?

A. He did not.

25 Q. Well, did you not inquire of him?

A. I asked him if they were not in the box, and he said he was quite sure they were not, that he thought they were taken back after the trial to the Surrogate's office. My counsel would know better than I about that.

26 Q. To whom do you refer by that?

F. 2003 A. Mr. Bovee, particularly; I would say Mr. Bovee or Mr. Parsons.

27 Q. Is Mr. Parsons your counsel?

A. Counsel for the other two executors.

28 Q. And not for you?

A. Not for me.

29 Q. What was the occasion of returning these papers, this will and codicils, to the Surrogate's office at the time subsequent to the date of this receipt now shown you?

A. I do not know.

30 Q. Did Mr. Myrick tell you what the occasion was?

A. He did not.

31 Q. So far as you know, has either Justus

F. 2004 L. Bulkley or Henry B. Vaughan had possession of the will and the codocils of Daniel B. Fayerweather, except in connection with your custody of them?

A. I do not know; I should say that I do not think so.

32 Q. If they were returned to the Surrogate's office they must have been returned from your custody, is not that so?

A. I think it probable.

33 Q. According to your mode of doing business in your office would such papers be returned to the Surrogate's office after you had given a receipt to the Sur-

rogate for them without any record in your office of the fact that they had been so returned and the occasion therefor?

A. There ought to be a record; I do not know that there is.

34 Q. Have you come here and given Mr. Myrick's impressions on that subject without yourself examining your customary records to see what they showed on the point?

A. I asked the question about five minutes be-
F. 2005 fore I came here, and it would take perhaps half an hour or an hour to look through the very voluminous entries in the various matters.

35 Q. Do you observe that the date of your receipt for the will and codicils is April 18th, 1893?

A. I do. That will help me to look for entries.

36 Q. Will you look into your records between now and two o'clock and attend here at that time with such information as your records have on that subject, and if there be any entry of the return of that will and codicils in your records to the Surrogate's Court, will you produce the record at that time?

A. The man to whom I should give the matter of looking up the record is ending up his vaca-
F. 2006 tion to-day, and Mr. Bovee, who would know also where to look, is out of town to-day.

37 Q. In the distribution of the business in your office, you have charge of the office records, have you not, youself?

A. Some of the time.

38 Q. Have you not on previous occasions testified that you customarily had charge in the distribution of the business of your office?

A. Except in matters where I am a client and the other people are—the other members of the firm represent me; I don't keep track of entries or records in those matters.

39 Q. And with that exception, the records in your office are under your immediate personal supervision, is that not so?

A. Yes, through clerks.

40 Q. You do not mean to convey that the records with reference to these papers are put into separate books in order that you should not know about them, do you?

A. There are so many different heads which have been directed by others and in charge of oth-
F. 2007 ers that I have not the knowledge of where to look that I would have in my ordinary business.

41 Q. Do you mean to say here that you are not able in the absence of Mr. Bovee and some other gentleman whom you do not name, to ascertain in the records of your office whether there is any entry of the return to the Surrogate's office subsequent to the April 18, 1893, of the original will of Daniel B. Fayerweather and the codicils?

A. I mean to say that it will be much easier and take less time than if I give the matter to one of them to look up for me.

42 Q. Well, you mean it will take less of your
F. 2008 time and more of ours, do you not; in other words, we will have to wait some time if we wait for that? In what time can you find such an entry, if it exists?

A. I have no idea.

43 Q Well, I will have to ask you to make the effort and attend at two o'clock and state the result of it?

A. Very well.

Mr. Sherman: Counsel for the complainants calls upon the counsel for Hamilton College to produce the original will and the four codicils thereof admitted to probate, inviting their attention to the fact that

they offered the original will in evidence, and it was in their custody on the 24th of January, 1894, upon the trial of the case of the Trustees of Amherst College against Ritch, before Judge Truax, as appears from folio 141 at page 47 of the record thereof.

Mr. Bishop: I state that as far as I know the will and codicils were not in the possession of the counsel for Hamilton College and are not now in their possession. If they were produced at all on the oc-
F. 2009 casion referred to, they were produced under subpœna by some other person and were left in the custody of such person.

44 Q. (Handing paper) I show you voucher No. 280, this paper, and I ask you if you know in whose handwriting the body of it is, and in whose handwriting is the signature?

A. The body, the handwriting is Mr. Myrick's, and whose handwriting the signature is I do not know.

45 Q. In other words, all of the paper which is not printed is in the handwriting of Mr. Myrick, except the signature? A. Yes.

46 Q. And whose the signature is you do not
F. 2010 know, is that the correct interpretation of what you say?

A. That is a correct statement.

47 Q. Did you file that paper as a voucher in your capacity as executor of the last will and codicils of Daniel B. Fayerweather?

A. I hink so.

48 Q. Did you file it as a receipt of Evarts, Choate & Beaman?

A. I have no recollection, but I should presume so.

49 Q. Well, are you able to state whether you got

that receipt back from Evarts, Choate & Beaman upon the payment of that amount?

Mr. Bishop: Objected to as incompetent, irrelevant and immaterial, and not within the issues.

A. There are no marks upon it that give me any information about it.

50 Q. Are you able to say whether you got that receipt back from Evarts, Choate &
F. 2011 Beaman, upon the payment of that amount?

Mr. Bishop: Objected to as incompetent, irrelevant and immaterial and not within the issues.

A. I do not remember; I csn only say I presume so. Where is the mark of its being a voucher?

51 Q. On the end? A. I see it.

Mr. Sherman: I ask to to have it marked for identification.

The paper is marked Complainant's Exhibit 1 for identification, September 30, 1898, J. A. S., Exr.

F. 2012 Mr. Sherman: I will read it.

Mr. Bishop: Then I object to it.

Mr. Sherman: It is only marked for identification.

Mr. Bishop: I object to this document which is marked for identification being read into the record as a part of the record.

Mr. Sherman (reading):

(In the margin) "Voucher 280.

New York, Feb'y 8, 1892.

Received of the executors of the estate of D. B. Fay-

erweather the sum of five thousand dollars in payment for legal services as per bill September 17, 1891.
$5,000.00 Evarts, Choate & Beaman."

Mr. Sherman: I ask the examiner to make the direction that the witness shall make a search and come here at two o'clock.

The Examiner directs the witness to be here at two o'clock.

F. 2013

At the request of the witness, he stating that it will be more convient to return at 2:30, the Examiner directs the witness to be here at 2:30 P. M.

Continuation of the examination of *THOMAS G. RITCH.*

By Mr. Sherman:

52 Q. Mr. Ritch, are you not able to give us
F. 2014 more information than you were at the time of your last examination herein as to the where abouts of Mr. Fayerweather's will and the probated codicils thereto?

A. I do not know where they are and I have made all the investigaion that I thought would lead to their discovery.

53 Q. Have you examined the box which which was locked by two keys, ane held by you and the other by Mr. Buckley, as you tesiified?

A. Yes, I went there with Mr. Buckley the day before the last adjournment. I think on Monday last,

and we went through the box carefully and neither the will nor any one of the codicils were there.

54 Q. Do you recall the fact that your firm appears to have given a receipt to the Surrogate's Court for the will, dated on or about April 18th, 1893?

A. I do.

55 Q. You were asked to look into the dockets of your office where entries of the outgoing and incoming of such papers would in the course of your business naturally be found, to ascertain whether any
F. 2015 entries at or subsequent to that date appears on the subject. Have you done so?

A. I did. I looked three months after and a month before. My recollection is quite clear that—

56 Q. Well, you have not said whether you found any such. You say you looked.

A. I have not found any such entries.

57 Q. And are there any entries in your office dockets or registers subsequent to April 18, 1893, indicating or showing any disposition of that will and those codicils down to this time?

A. I found none and my clerks have found
F. 2016 none.

58 Q. Are you prepared to say there are none?

A. I am quite sure there are none.

59 Q. I will ask you to produce here at the next session all the records in which such entries could be found if they existed. Will you do so?

A. If I am directed to.

60 Q. From whom do you desire a direction?

A. I shall turn the matter over to Mr. Bovee and Mr. Wallace and let them tell me what to do.

61 Q. Do you mean to say that you will produce evidence called for by the complainants if the counsel for

the defendants or some of them direct you to do so; is that what you mean?

A. I will do whatever I am directed to by my counsel.

62 Q. Is it necessary for me to apply to the Court for a direction to you on that subject?

A. No, I think not.

63 Q. Will you produce those books at the next session?

F. 2017 A. Yes.

64 Q. What is the most recent occassion when your mind has been charged with the existence or whereabouts of the will and codicils, the probate codicils, of Mr. Fayerweather?

A. I know that they were produced on the trial before Judge Truax, whenever that was, and there is a memorandum in the printed book to that effect.

65 Q. Do you refer to the statement in the printed book that those papers were produced by Mr. Root on the trial of that case?

A. Yes.

66 Q. Were you in court at the time?

F. 2018 A. I was.

67 Q. Are you prepared to say that that statement in the printed book is correct?

Mr. Root: Objected to as to form, as embodying a statement that is not correct.

A. That they were there, but that they were produced by Mr. Root I have no knowledge or recollection.

68 Q. Do you mean to refer us to this investigation to a record as containing verity when you have no opinion or knowledge that it is true?

A. My recollection is distinct that those papers were there at that time and that they were shown to me when I was a witness, that is all.

69 Q. The record to which you refer is that which states that Mr. Root produced them, is it not?

A. That called my attention to the fact, and remembered it independently of the record.

70 Q. Well, that is the record, is it not, to which you referred just now?

A. I think so.

F. 2019 71 Q. There is not any other record of their production except by Mr. Root, is there?

A. Not that I know of.

72 Q. None known to you?

A. None known to me.

73 Q. And there is something in the record which indicates that Mr. Root produced it?

A. I did not know what the record was, I simply saw the printed case in Mr. Bishop's hand; I do not know what book he had.

74 Q. You regard that as consistent with the question which you answered five questions ago, do you?

A. You are asking me to state what I abso-
F. 2020 lutely know.

75 Q. No.

A. It was stated that that was the record; all I looked at was the printed page.

76 Q. Is the page to which you refer here in Court?

A. I do not know.

77 Q. What is the best description you can give of that paper now?

A. It was a printed book; it looked like a printed record of a law case.

78 Q. Mr. Ritch, you are one of the defendants in this action, are you not?

A. I am.

79 Q. And you have interposed any denying the averments of the complaint?

A. Yes.

80 Q. In pursuance of your obligation to tell the truth, the whole truth and nothing but the truth, under the oath you have just taken, can you give no better answer in reference to the printed page to which you have just referred than that which you have given?

A. The only thing is that I saw that page and
F. 2021 I did not see the book or anything except the open page.

81 Q. It was a page out of the air without any connection, was it?

A. It was a printed page in a book.

82 Q. In a book, and that led you to state that the will ahd the four codicils were produced on that trial before Judge Truax; is that so?

A. That is not so; I stated from my independent recollection I remembered they were produced on the trial.

83 Q. And your recollection was refreshed by a circumstance which, so far as you know, had no connection with the trial, is that what you say?

F. 2022 A. Either you or Mr. Bishop stated that that date was a year later than the date of my receipt, and I assumed that what you agreed upon was correct.

84 Q. You say that I stated any such thing?

A. Perhaps it was Mr. Bishop.

85 Q. Who was it that had the book, Mr. Bishop or I?

A. Mr. Bishop had the book.

86 Q. And I had it not, is not that right? Did you see me look at it?

A. I do not remember; there was a general acquiescence in the fact that that was a record of some-

thing, that was a year later than my receipt or the receipt of my firm.

87 Q. Then your independent recollection having been refreshed by this printed page which you are unable to give any better description of than what appears in your testimony, you are unable to remember who produced the will and codicils at that time; is that what you say?

A. I am.

88 Q. You have no reason to think that that will and codicils were produced by the counsel for the

F. 2023 present complainants, have you?

A. I do not remember.

89 Q. Yo do not remember, you think that may be so, do you?

A. I should think not, only from the recollection of the sentence that was read that Mr. Root produced them.

90 Q. What sentence do you refer to, this printed page which you are unable to connect with any record or other description?

A. Yes, the sentence which Mr. Bishop read from that printed page is the only reason I have for saying that I am of the opinion that Mr. Root produced it and not the counsel for the complainants here.

F. 2024 91 Q. You were entirely familiar with the course of that litigation, were you not?

A. Yes.

92 Q. At what stage of the case was it that the will and the codicils were thus produced on that trial?

A. I do not remember.

92 Q. Was it on the plaintiff's case or the defendant's?

A. I do not remember.

93 Q. You mean to say that you do not remember whether in an action brought to establish a secret trust and impose it on your conscience, where you sat there as a defendant in the case and where Mr. Root was the counsel for the plaintiffs, that you do not remember

whether the introduction of the will and the codicils into the testimony in the case came first from the plaintiffs or from the defendants; is that what you say?

A. I only remember that in the ordinary course of such trials they would naturally be produced by the plaintiff.

94 Q. But that does not refresh your memory as to whether that was the fact, does it?

A. I do not recall it.

95 Q. And you still adhere to your statement
F. 2025. that you do not remember whether that will and those codicils came up on that record first from the plaintiff or from the defendants, is that what you say?

A. It is an inference; my belief is that they were produced by the plaintiff, but I have no recollection.

96 Q. You have the independent recollection that they were produced on that trial, you have said it is so far refreshed by the paper that you remember it independently of the paper; have you not so testified?

A. I have so testified.

97 Q. And your memory stops there, does it, and you do not remember and you cannot now recall whether it was produced on the part of the
F. 2026 plaintiffs or the defendants on that trial; is that what you say?

A. My best recollection would be that the plaintiffs produced it.

98 Q. Was not Mr. Root acting as counsel for the plaintiffs on that trial?

A. One of the counsel, Mr. Bishop another.

99 Q. Mr. Root was one of the active counsel in trying the case, was he not? A. He was.

100 Q. You remember that very well, do you not?

A. Very well.

101 Q. Your memory has not been particularly impaired so far as you know since then, has it?

A. I think not.

102 Q. You consider that your memory is still in good condition, do you not?

A. In fair condition.

103 Q. Now, inasmuch as this paper which you say was read by you to Mr. Bishop, states together that the will was produced and the codicils and that Mr. Root produced them, do you mean to say now that now your memory is not refreshed quite as much that Mr. Root produced them as the bald fact

F. 2027 that they were produced?

Mr. Root: Objected to as to form, as including a statement which is not correct. I do not that the paper states anything of the sort.

A. I have no recollection whatever indepenpent of that statement.

104 Q. (Handing book) I show you the Court of Appeals record on file in this Court, filed in this cause September 17, 1897, and I ask your attention to page 289 of the record, and I ask you to read that page.

F. 2028 Witness reads.

105 Q. Have you read that Mr. Ritch?

A. I have.

106 Q. You observe that you were called as a witness immediately after the introduction of the will and codicils?

A. Yes.

107 Q. Now, will you say whether, having looked at that record, your memory is refreshed as to the fact as to whether Mr. Root offered those papers in evidence?

A. I have no recollection independent of the rec-

ord that he rather than Mr. Bishop or any one else offered the papers.

108 Q. The will and those codicils had previously been in your possession, had they not?

A. Between—before that?

109 Q. Previous to their having been offered in evievidence in that case?

A. I think not.

110 Q. They had not previously been in your possesat all, you cannot mean that, Mr. Ritch!

F. 2029 A. I do mean it?

111 Q. Never previously been in your possession?

A. Certainly they had been in my possession, but between the time they were filed for probate in the Surrogate's Court, and the time of that trial, I am quite sure that they were never in my possession.

112 Q. Do you mean in your personal possession, or in that of your firm?

A. Either personal possession or that of the firm.

113 Q. Do you mean, then, to imply or impute that the receipt held by the Surrogate signed by your firm, or signed by Mr. MacArthur for your firm a forgery?

F. 2030 A. No, sir; it is a correct signature.

114 Q. The will and these codicils were offered in evidence on the trial before Judge Truax and you testified, as appears from the record, on January 24, 1894. Your receipt for the will and codicils is dated the 18th of April, 1893. Can you offer any explanation as to the whereabouts and custody of those papers in the meantime?

A. My recollection is quite distinct in this, as to this state of facts, that at the time of the trial before Surrogate Mr. MacArthur acted as general custodian of the will and codicils and a very large number of exhibits, and that my impression is, I should say was my

best recollection is, that as soon as that trial was over everything was returned to the Surrogate's Court by Mr. MacArthur and that the will and codicils were there until they were produced on the succeeding trial. My impression is that when all those exhibits are found, which I have several times asked that they be looked up—

115 Q. You are not testifying about anything that I asked you about. Your answer will be stricken out. I did not ask you about your impression.

F. 2031 A. I am giving my belief as to the state of things, and I believe that the will and codicils are all together, mislaid in the Surrogates' office.

Mr. Sherman: I move to strike out the answers as not responsive and as incompetent, irrelevant and immaterial, and I repeat the question.

116 Q. The will and those codicils were offered in evidence on the trial before Judge Truax and you testified, as appeari srom the record, on January 24, 1894. Your receipt for the will and codicils is dated the 18th of April, 1893. Can you offer any explanation as to the whereabouts and custody of those papers in

F. 2032 the meantime?

A. My explanation is and my belief that Mr. MacArthur as temporary custodian of all papers took the will codicils back to the Surrogate's Court after the trial.

117 Q. And he, you say, is in Paris?

A. Yes.

118 Q. Do you intend to testify positively to that fact?

A. That is my best recollection.

119 Q. Have you a recollection of that fact?

A. Yes, I think I can can say that I have quite a distinct recollection that that was the course of those papers.

120 Q. You observe that I have confined the matter inquired of to the period between April 18, 1893, and January 24, 1894?

A. Yes.

121 Q. You intend your answer, your last answer, to apply to that period of time, do you?

A. That period or time, and so far as the whereabouts of those papers are concerned, I intend that it shall apply to all the time since the Surrogate's trial except as they may have been temporarily taken from the

F. 2033 Surrogate's office.

122 Q. In giving this testimony you are under some pressure to conclude it as rapidly as possible and get back to your office, are you not?

A. I have arranged matters so that I can give the time if necessary.

123 Q. All right, Mr. Ritch, you understand that the integrity and production of this will and codicils is a matter which very much concerns your reputation?

A. I do not.

124 Q. You do not; you think that under a charge that you have furnished an abortive plan to evade

F. 2034 the statute of wills which put it within your power to appropriate an estate of three millions to your own purposes, where the Federal Court has decided that as against tnese complainants those questions have not been disposed of, and under a claim further that the codicil purporting to be executed on the 15th of November, 1890, under the probate of which connection with the will you were enabled to get into your control an estate of about six millions of dollars, and where the claim is made that that codicil of November 15th was an act of violence upon Mr. Fayerweather, that his mind and probably his body never took any part in it, and that by a

preceding codicil destroyed by one of your alleged co-executors and which was executed on the 11th of November, 1890, the legal title to this fund may have been and was divested from you, and in the progress of an attempt of the complainants to substantiate that claim by proof, you being called upon as the last receiptor for the documents in question, it being essential to examine the original documents and to enquire into the evidence of forgery in the codicil of November 15th, 1890, you think that your reputation is
F. 2035 not concerned in the productioh of those papers; is that what you mean to say?

A. I think the history of this case is so well known that my reputation is not particularly affected.

125 Q. And you think it is a matter of unconcern as far as you are affected, whether the complainants shall be enabled to subject the original codicil of November 15th, 1890, to any further inspection of experts or others, do you?

A. I would be very glad to produce those papers, I would be very glad to know where they are. I have spent hours myself and my clerks have spent hours in endeavoring to find them. They have been handled by a great many people who are not con-
F. 2036 nected with my office.

126 Q. Where have you a distinct recollection that you last saw them?

A. When they were produced on that trial before Judge Truax.

127 Q. And that was subsequent to this receipt of April 18, 1893, necessarily?

A. Yes.

128 Q. But how Mr. Root got them to offer in evidence you do not know and have no recollection; is that correct?

A. It is entirely correct,

129 Q. And what became of them after that you have

no knowledge or impression, except that Mr. MacArthur has taken them back to the Surrogate's office and that they have been mislaid there?

A. Not at that time: my testimony as to his custody of them relates entirely to the hearing before the Surrogate.

130 Q. That was prior to April 18th, 1893?

A. Yes.

131 Q. So that in taking your former testimony in the light of that statement Mr. MacArthur s
F. 2037 occasion to return them to the Surrogate as the general custodian for all concerned was prior to the receipt given by him on behalf of your firm on the 18th of April, 1893, is that right?

A. That receipt must have been given at the time he took the papers.

Mr. Sherman: I move to strike the answer out as not responsive, and I repeat the question.

132 Q. (Question repeated.)

A. It would be subsequent to his giving the receipt?

A. He received them first and returned them afterwards.

Mr. Sherman: I move to strike that answer out
F. 2038 as not responsive, and I repeat the question.

134 Q. (Question repeated.)

A. No.

135 Q. Mr. Ritch, did you ever see Mr. Fayerweather's signature to the codicil of November 15, 1890?

A. His signature to the codicil?

Mr. Sherman: Never mind. I do not think I can go any further with Mr. Ritch until he brings those books here; I understand he will bring them here. When will it be agreeable to you, Mr. Root, to cross-examine the witnesses who have been already xamined? When shall we go on again with Mr.

Ritch? I shall be glad to consult your convenience as far as I can.

Mr. Root: Any time except Monday.

Adjourned to October 18, 1898 at 10:00 a. m.

F. 2039

New York, October 18, 1898.

Met pursuant to adjournment. Present: The Examiner, Mr. Sherman, Mr. Blaikie, Mr. Root and Mr. Hume.

Continuation of the examination of *THOMAS G. RITCH.*

F. 2040 By Mr. Sherman:

136 Q. Are you now able to produce the will and the four probated codicils thereto of the late Daniel B. Fayerweather?

A. I am not.

137 Q. Mr. Ritch, on or about June 27, 1892, was there pending in the Surrogate's Court a matter of the partial settlement of the accounts of yourself and Messrs. Bulkley & Vaughan as executors of the estate of Daniel B. Fayerweather?

A. I think so. My general recollection is that something was pending all the time.

138 Q. And was that matter referred to Scott Lord as Referee?

A. There was one reference pending before him.

139 Q. And in the course of that reference did you adduce testimony in support of certain credits which you claimed upon that accounting?

A. I think so.

140 Q. And was one of those credits an item of $5,000, which you claimed to have paid to the firm of Evarts, Choate, & Beaman, as shown by the receipt for-
F. 2041 merly identified by you herein and offered in evidence?

A. I have no recollection as between one account and another. When is the time of which you speak? June 27th?

141 Q. That is what the record says, in the matter of the partial settlement of the account of Justus L. Bulkley, Thomas G. Ritch and Henry B. Vaughan, as executors of the estate of Daniel B. Fayerweather, before Scott Lord, Esq., Referee, New York, June 27th, 1892.

A. I am quite sure that I was not present at that time, from the fact that the day before a daughter of mine died.

F. 2042 142 Q. Do you confine your answer to that date?

A. I had nothing personally to do with the first accounting during that time, as I recollect, because of that circumstance. If vouchers were filed or testimony taken, it was done by somebody else than myself.

143 Q. That proceeding before Scott Lord as referee continued down to and after October 5th, 1892, didn't it?

A. During all that time another daughter was exceedingly ill with two trained nurses in attendance and I do not think I had anything to do with that first accounting; the second daughter afterwards died.

Mr. Sherman: Solicitor for complainant moves to strike out the answer as not responsive.

144 Q That proceeding before Scott Lord as Referee continued down to and after October 5th, 1892, didn't it?

A. I remember very little about the proceeding for the reason which I have given.

Mr. Sherman: I move to strike out the answer as not responsive..

145 Q. That proceeding before Scott Lord as
F. 2043 Referee continued down to and after October 5th, 1892, didn't it?

A. I do not remember anything about it except that there was that reference and I think I gave some testimony.

146 Q. Your partner, General Stewart L. Woodford, also gave testimony, did he not?

A. I do not remember.

147 Q. Do you mean to say that you were not present when he gave his testimony, Mr. Ritch?

A. I do not remember being present.

148 Q. His evidence was not adduced by the complainants herein, was it?

A. I do not remember.

F. 2044 149 Q. Have you any reason to think that Emma S. Fayerweather or Mary W. Achter called Mr. Woodford on that proceeding?

A. I have no reason to suppose that they did.

150 Q. You have every reason to suppose that they did not, have you not? and you know that they did not, do you not?

A. Yes, I will say that I know they did not, for the same reason only that I would know that a good many other people would have no reason for calling him as a witness.

Mr. Sherman: I move to strike out that part of the

answer beginning "for the same reason" as impertinent and not responsive.

The witness: I have no knowledge whatever what witnesses were called by Mrs. Fayerweather or Mrs. Achter.

Mr. Sherman: There is no question pending, Mr. Ritch. I move to strike out that statement by the witness as impertinent and not responsive to any question; and I ask the examiner to certify this ex-
F. 2045 amination to the Court in order that the Court may make suitable directions for the observance by the witness of the proper rules covering such examinations.

151 Q. Do you know whether Mr. Woodford was a witness in support of credits claimed by you on that accounting?

A. I do not remember; I only presume that he was.

152 Q. Don't you know that he was?

A. I do not.

153 Q. You know that you received credit in your accounts for that item of $5,000, as paid to Evarts, Choate & Beaman, do you not?

F. 2046 A. I think credits were given for all vouchers that were put in; I think that was put in in one or the other of the first two accounts.

154 Q. You know that it was evidence given upon your part to sustain its correctness as a credit against the estate; do you not know that?

A. That is my best recollection.

155 Q. And you know that Mr. Woodford was one of those witnesses, do you not, to explain those items?

A. I do not.

156 Q. You do not know that?

A. No.

157 Q. Mr. Ritch, did you not at that accounting give evidence yourself in support of—

A. What accounting?

158 Q. Before Scott Lord, give evidence yourself in support of that item?

A. I gave testimony, but any answer to questions that were asked of me and what the questions were or what the answers were, I have no present recollection.

159 Q. Did you testify in substance that during the progress of the trial upon the objections to the
F. 2047 probate before the Surrogate a member of the firm of Evarts, Choate & Beaman being a witness before the Surrogate was threatened with imprisonment by the Surrogate for failure to answer some questions where he pleaded privilege of counsel; didn't you so testify?

A. I do not remember.

160 Q. Was that the fact?

A. What fact, that I did so testify, or the fact of what occurred before the Surrogate?

161 Q. The fact of what occurred before the Surrogate.

A. My recollection is that Mr. Butler was called as a witness, there was discussion as to his testimony, he declined to answer. What the disposition of
F. 2048 the matter by the Surrogate was, I do not now remember; my best recollection is that the settlement of the matter left that undisposed of; I may be mistaken.

Mr. Sherman: Solicitor for complainants moves to strike out that part of the answer commencing "what the disposition of the matter by the Surrogate was" as not responsive.

162 Q. Do you remember that an adjournment was taken so that Mr. Butler might consult counsel with regard to his duty and that as you understood he advised

with Mr. Joseph H. Choate, and when the case came on again Mr. Choate was in Court prepared, as he told you or that he had examined the matter and was prepared to argue the question of privilege and oppose the disclosure by Mr. Butler, or that in substance?

A. My best recollection is that the adjournment was taken to consult counsel, I do not remember being present when Mr. Choate argued the matter.

Mr. Sherman: I move to strike out that part of
F. 2049 the answer commencing "I do not remember being present," as not responsive.

163 Q. Do you remember that an adjournment was taken so that Mr. Butler might consult counsel with regard to his duty and that as you understood he advised with Mr. Joseph H. Choate, and when the case came on again Mr. Choate was in Court prepared, as he told you, or that he had examined the matter and was prepared to argue the question of privilege and oppose the disclosure by Mr Butler, or that in substance?

A. I do not not remember hearing any argument by Mr. Choate.

F. 2050

Mr. Sherman: I move to strike out the answer as not responsive.

164 Q. Do you remember that an adjournment was taken so that Mr. Butler might consult counsel with regard to his duty and that as you understood he advised with Mr. Joseph H. Choate, and when the case came on again Mr. Choate was in Court prepared, as he told you, or that he examined the matter and was prepared to argue the question of privilege and oppose the disclosure by Mr. Butler, or that in substance?

A. I am quite sure I was not in Court and I have no personal knowledge of what Mr. Choate did.

Mr. Sherman: I move to strike out the answer as not responsive.

165 Q. Do you remember that an adjournment was taken so that Mr. Butler might consult counsel with regard to his duty and that as you understood he advised with Mr. Joseph Choate, and when the case came on again Mr. Choate was in Court prepared, as he told you to, or that he examined the matter and was prepared to argue the question of privilege and oppose the
F. 2051 disclosure by Mr. Butler, or that in substance?

A. I do not remember anything, I do not know anything beyond the fact that the adjournment was taken to enable Mr. Butler to consult with counsel; I understood that counsel was Mr. Choate; and I am quite sure that the next day when the matter came up I was not present, had no conversation with Mr. Choate about the matter, and do not now recall what argument he made or where he made it.

Mr. Sherman: I move to strike out the answer as not responsive, commencing with the words, "I am not sure."

F. 2052

166 Q. Do you remember that an adjournment was taken so that Mr. Butler might consult counsel with regard to his duty and that as you understood he advised with Mr. Joseph H. Choate, and when the case came on again Mr. Choate was in Court prepared, as he told you, or that he examined the matter and was prepared to argue the question of privilege and oppose the disclosure by Mr. Butler, or that in substance?

A. I have not any other answer to give.

167 Q. Do you mean that you cannot remember the matters inquired of with more particularity than you have stated?

A. I have given my best recollection.

168 Q. Have you given all of your best recollection or only a part of it?

A. Pertinent to your question, yes.

Mr. Sherman: I move to strike out the answer, "pertinent to your question" as not responsive.

169 Q. Was that item of $5,000, paid to Evarts, Choate & Beaman, in part for that service, or such service as is embodied in my question, and did you claim it for that purpose as a credit to you?

F. 2053 A. $5,000 was paid to Evarts, Choate & Beaman for such services as they rendered.

170 Q. Did the service which they rendered and for which that was paid include the preparation or the readiness of Mr. Choate to oppose the disclosure by his partner, Mr. Butler, of the codicil, of the contents of the burnt codicil,?

A. I think what Mr. Choate did was an element in that bill; I do not remember the items now.

171 Q. Have you not yourself testified in support of that item that such service was included in the payment of $5,000 to Mr. Choate's firm?

A. I do not remember.

172 Q. You do not remember anything to the

F. 2054 contrary, do you?

A. I do not.

173 Q. Did you not understand when, as executor of the last will and testament of Daniel B. Fayerweather, you paid $5,000 to Evarts, Choate & Beaman, that the sum was paid in part to employ Mr. Choate to resist the disclosure by Mr. Butler of the contents of the burnt codicil, so called?

A. I remember that Mr. Choate's services in connection with Mr. Butler's connection with the matter before the Surrogate. I remember that was an element in the bill.

174 Q. Do you remember any other service that Mr.

Choate rendered or prepared himself to render before the Surrogate, except to resist the disclosure by his partner Mr. Butler of the contents of the burnt codicil?

A. I do not.

175 Q. So far as you know, was not that the only service you rendered by Mr. Choate in that connection?

A. It was just as probable there was other service as that there was not; I signed the check for

F. 2055 the bill because counsel for the three executors approved it. I only remember the fact that that bill was paid. What its form was or what the items were I do not remember.

Mr. Sherman: I move to strike out the first sentence of the answer as not responsive and as hypothetical and conjectural and as not evidence.

176 Q. But your firm took upon it the active conduct of the litigation on the part of the probate of the will, did it not?

A. It did.

177 Q. Did your partner, Mr. Arnoux, before the witnesses attesting the codicil of November 15th,

F. 2056 1890, were put upon the stand, drill the witnesses and instruct them in the testimony they should give?

A. What is that?

178 Q. Did your partner, Mr. Arnoux, before the witnesses attesting the codicil of November 15th, 1890, were put upon the stand, drill the witnesses and instruct them in the testimony they should give?

A. I have no knowledge that he did, or intimation that he did.

179 Q. Were you present before Scott Lord as referee when Judge Arnoux testified to the items claimed as credit by your firm for legal services?

A. I have no recollection.

180 Q. Will you say that you were not?

A. I presume that I was not, for I was present very little of the time.

Mr. Sherman: I move to strike out the answer as not responsive.

181 Q. Will you say that you were not present?

A. I do not remember.

182 Q. You know the fact, do you not, that your
F. 2057 firm of Arnoux, Ritch & Woodford, made claims against this estate through you as executor and the other executors for services performed in reference to to the probate of the will?

A. They did.

183 Q. They were allowed considerable sums for that, were they not?

A. I believe so.

184 Q. Do you remember how much?

A. I do not.

185 Q. Were you furnished with a transcript of the stenographer's notes of that testimony as it proceeded?

F. 2058 A. When?

186 Q. As it proceeded?

A. I do not remember.

187 Q. Have you not claimed and received credit as disbursements for those transcripts in your accounts as executors?

A. Claimed credits for the disbursements which were made, and I believe they were, paid, and stenographer's bills were a considerable item.

Mr. Sherman: I move to strike the answer out as not responsive.

188 Q. Have you not claimed and received credit as

disbursements for those transcripts in your accounts as executors?

A. The minutes were not furnished to me.

Mr. Sherman: I move to strike the answer out as not responsive.

189 Q. Have you not claimed and received credit as disbursements for those transcripts in your accounts as executors?

2059 A. I do not remember.

190 Q. Do you remember Judge Arnoux's testifying in support of the claims of your firm in substance, that prior to the witnesses to the codicil of November 15th being put on the stand he rehearsed the testimony, that he put them various questions, assuming the positions of the various assumed contestants, endeavored to ascertain what line of attack upon their testimony would be adopted, and drilled them as to what their answers should be and instructed them in what manner to meet the anticipated attack?

A. I do not remember any such testimony.

191 Q. If he so testified and if that were
F. 2060 done, was it done with your assent and authority?

Mr. Root: I have a special objection to that as to form, as hypothetical and involving a hypothesis and an assumption that is not true.

A. I decline to answer such a question as that.

192 Q. Upon what ground do you decline to answer, on the ground that it will incriminate you?

A. On the ground of its extreme irrelevance and its impertinence.

Mr. Sherman: I move the examiner to certify the

record of the Court. That is all with Mr. Ritch until this question is disposed of. Solicitor for the complainants now tenders the witness Mrs. Goodwin for cross-examination.

Mr. Root: Solicitor for the defendant, Trustees of Hamilton College, declines to cross-examine, saying that no part of the testimony of this witness has anything to do with the issues joined.

F. 2061 Mr. Sherman: Solicitor for the complainants ask for an adjournment of the taking of depositions until 2.30 p.m.

Mr. Root: I have to be in the Appellate Division at that time.

Mr. Sherman: What is the next day on which it will be convenient for you to proceed?

Mr. Root: Thursday.

Adjourned to October 20th, 1898, at 2:30 p. m.

F. 2062

THOMAS G. RITCH.

Sworn to before me this 17th day of April, 1899.

JOHN A. SHIELDS,

Examiner.

Defendants counsel objects to the reading into the record of the receipt marked Exhibit 1 for identification after question 51 as irrelevant and immaterial to the issues presented upon the special pleas.

Defendants counsel objects to question 52 as irrelevant and immaterial to the issues presented upon the special pleas, and on the further ground that the original will and codicil has already been produced by counsel for complainants and introduced in evidence upon this proceeding, and any testimony or inquiry in respect
F. 2063 to the whereabouts of that will and codicil is utterly trivial.

Same objection to question 53

Same objection to question 54.

Same objection to question 55.

Same objection to Question 56.

Same objection to Question 57.

Same objection to question 58.

Same objection to question 59.

F. 2064 Same objection to question 60.

Same objection to question 61.

Same objection to question 62.

Same objection to question 63.

Same objection to Question 64.

Same objection to question 65.

Same objection to question 66.

Same objection to quession 67.

Same objection to question 69.

Defendants object to question 124 as irrelevant and immaterial to the issues presented upon the special pleas,

and incompetent, calling for the operation of the witness's mind.

Same objection to question 125.

Defendants counsel moves to strike out all of the testimony of Thomas G. Ritch from question 52 to 136, inclusive, and the answer thereto, as irrelevant and immaterial to the issues presented upon the special pleas, and upon the further ground that the original will and codicils have been found by counsel for the com-
F. 2065 plainants, and introduced in evidence in this proceeding, and any inquiry in respect to the whereabouts of the will and codicils prior to that time is immaterial and trivial.

Defendants object to question 140 as irrelevant and immaterial to the issues presented upon the special pleas, and incompetent.

Defendants object to question 144 as irrelevant and immaterial to the issues presented upon the special pleas.

Same objection to question 145.

Defendants object to question 150 as irrelevant and immaterial to the issues presented upon the spe-
F. 2066 cial pleas and incompetent.

Defendants object to question 153 as irrelevant and immaterial to the issues presented upon the special pleas.

Same objection to question 154.

Same objection to question 155.

Same objection to question 159.

Same objection to question 163.

Same objection to question 164.

Same objection to question 165.

Same objection to question 166.

Same objection to question 167.

Same objection to question 168.

Same objection to question 169.

Same objection to question 170.

Same objection to question 173.

Same objection to question 174.

Same objection to question 175.

Same objection to question 178.

Mr. Blaikie: If you are free from court engage-
F. 2067 ments will you put in any evidence to-morrow if we do not?

Mr. Bovee: I do not know whether I will examine Mr. Ritch or not. You will produce him I suppose for cross-examination.

Mr. Blaikie: If you want us to I will take steps to do that. Shall I produce him to-morrow morning?

Mr. Bovee: You need not. Counsel for complainants need not subpoena the witness Ritch and physically produce him for cross-examination; counsel for the defendants will indicate later whether
F. 2068 they wish to cross-examine Mr. Ritch, and if they do they will produce him.

Mr. Blaikie: Will you produce Mr. Vaughan to sign his testimony?

Mr. Bovee: Vaughan?

Mr. Blaikie: Yes, we have tried to find him but we cannot. Will you arrange about that?

Mr. Bovee: Undoubtedly he will be produced for the purpose of signing his deposition at sometime or another.

Mr. Blaikie: Shall we adjourn to to-morrow morning?

Mr. Bovee: We may take the adjournment to to-morrow morning, but I expect to be engaged in the trial of a case in the Supreme Court to-morrow.

Adjourned to March 5th, 1901, at 10:30 a. m.

F. 2069

COMPLAINANTS' PROOF.

NEW YORK, March 5th, 1901.

Met pursuant to adjournment. Present: The Examiner, Mr. Blaikie, a representative of Mr. Bovee, and a representative of Root, Howard, Winthrop & Stimson.

Adjourned to March 12th, 1902, at 10:30 a. m.

F. 2070

COMPLAINANTS' PROOF.

NEW YORK, March 12th, 1901.

Met pursuant to adjournment. Present: The Examiner, Mr. Sherman, Mr. Blaikie, a representative of Ritch, Woodford, Bovee & Wallace, a representative of Root, Howard, Winthrop & Stimson, and a representative of Russell & Holmes.

Mr. Bovee's representative states that Mr. Bovee does not care to go on to-day unless it is absolutely necessary.

Mr. Sherman: I want to put on the record this statement to cover any possible misunderstanding The complainants offer in evidence, under the agreement heretofore made, by way of re-direct examination of the witness Anner Amelia Reynolds, that part of her testimony in the Five College action which was not read by
F. 2071 way of cross-examination on the part of the defendants.

Mr. Bovee's Representative: Mr. Bovee reserves his right to put in objections.

Adjourned to March 15th, 1901, at 10:30 a. m.

COMPLAINANTS' PROOFS.

NEW YORK, March 15th, 1901.

F. 2072· Met pursuant to adjournment.

Present: The Examiner, Mr. Sherman, Mr. Blaikie, Mr. Bovee, Mr. Stimson, Mr. Fain, a representative of Nash & Jones and a representative of Russell & Holmes

ASHLEY W. COOPER, called as a witness on behalf of the complainants, being duly sworn, testified as follows:

Direct examination by Mr. Sherman:

TESTIMONY OF A. W. COOPER.

1 Q. Mr. Cooper, you are one of the clerks of this Court, are you not?

A. Yes, sir.

2 Q. And among your other duties you are assigned to the part at which the motions are heard before Judge Lacombe, are you not?

A. Yes, sir.

3 Q. Do you recall a motion being made in this case to strike out the plea of Mr. Thomas G. Ritch unless he should produce and file the original will and cod-
F. 2073 icils of Daniel B. Fayerweather, or to that effect?

A. Yes, sir.

4 Q. When was that motion argued before Judge Lacombe?

A. The 30th of November, 1900.

5 Q. And was the motion taken under advisement?

A. Yes, sir.

6 Q. Has any disposition ever been made of it?

A. Not to my knowledge.

7 Q. Have you there the original motion papers as submitted on that motion?

A. Yes, sir.

F. 2074 Mr. Sherman: I desire to have them marked in evidence.

Mr. Bover: I object to their being marked in evidence, and I ask the examiner to certify this objection to the Court. The ground of my objection is that they are irrelevant and immaterial to the issues presented on the special pleas here; and the complainants have already produced from the records of the Surrogate's Court the original will and codicils, any testimony in respect of the disappearance of the will and codicils becomes entirely irrelevant and immaterial and incompetent.

Mr. Sherman: Counsel for complainants states that his object in making this proof is to show the practices adopted by the defendants in the conduct of the very cause itself, and to show when first the codicils became practically accessible to the complainants, to show that they remained prior thereto in the control and custody of the defendant Thomas G. Ritch, to show that he attempted to suppress them and to prevent the complainants from having access to them or to have them photographed or
F. 2075 exhibited to experts, and that he yielded only to the pressure of the pending motion to strike out his plea and then placed them or caused them to be placed in the Surrogate's office where they would be discovered. Complainants rely upon these facts not only to relieve the complainants from any suggestion of laches, but also to show the attempt by the defendants to practice a gross fraud upon the complainants and upon the Court in the very conduct of this cause. Complainants further protest against the reiterated objections on this record which are not available to all the defendants and which constitute no reason whatever to prevent the receipt in evidence against the defendants who have an-
F. 2076 swered, and protest against the delay and obstruction caused by the demand for a certificate upon this objection.

Mr. Bover: Counsel for the defendants states in answer to the statement of counsel for the complainants that the will and codicils were produced by the Clerk of the Surrogate's Court upon subpœna of the counsel for complainants, that the record discloses that that will and codicils, so far as the defendant Thomas G. Ritch is concerned, had always been on file in that office, that the will and codicils were not returned to that office by the defendant Ritch after the motion

was made to strike out his answer, and that any statement that the will and codicils had been suppressed or its whereabouts concealed is without justification or foundation and absolutely inexcusable.

Mr. Sherman: Counsel for the complainants protest against the statement of facts upon the record just made by counsel for the defendants, not made under oath and not being recitals of anything in evidence and entirely unauthorised and improper.

F. 2077 Mr. Bovee: I will send for Mr. Shields.

The Commissioner was thereupon sent for.

Mr. Bovee: Mr. Examiner, some documents are offered in evidence by the complainants here from the records of your Court. They consist of the motion papers on the motion made before Judge Lacombe to strike out the answer or the plea of the defendant Ritch on the ground that he had concealed the will and codicils of Mr. Fayerweather. The motion was argued before Judge Lacombe, and so far as we know the matter has never been determined. As matter of fact, the will and codicils have been found
F. 2078 by complainants in the Surrogate's office where they properly belong and produced here and photographed and marked in evidence before you. That has been brought to the attention of Judge Lacombe, and we all know that he dropped the motion as a matter unworthy of further consideration. Now for some purpose best known to the complainants they offer in evidence those motion papers. I object to them. I think it is an abuse of the rule of the Court to lumber up his record with matters of such a useless character as that.

Mr. Sherman: This record is our record and we are paying for it.

Mr. Bovee: Well, that don't give you the right to put in matters of this character.

The Examiner: They may have to pay for it eventually, Mr. Sherman.

Mr. Bovee: We have no apprehension that we will ever have to pay for it.

The Examiner: Well, do you want a certificate?

Mr. Bovee: Yes, I ask that the objection be certified to the Court.

F. 2079 The Examiner: I will certify it.

Mr. Sherman: Wait a minute, Mr. Examiner. Whenever Mr. Bovee wants an adjournment or wants to stop the taking of testimony for any reason he thinks it is a good way to accomplish his purpose to have an objection certified to the Court. Now there have been at least twenty objections certified to the Court, which he has never called to the attention of the Court.; and I think this is played out.

Mr. Bovee: I propose to call this to the attention of the Court, Mr. Sherman.

Mr. Sherman: I want to be heard when you are all through. Now here is a record from the files of the Court offered in evidence in this cause. If any prejudice can arise from its receipt in evidence

F. 2080 it can be disposed of in the way in which five hundred questions remain in this case to be disposed of. But to stop this proceeding after we have been taking testimony for about ten minutes on a certificate of that kind I think is an abuse. Now my learned opponent says that I am doing this for reasons best known to myself. As I have taken him into my confidence I think he knows as well as I do what I am doing it for. We have been trying for years to get these codicils where we would photograph them and submit the signature of the dying day codicil to an expert, being confident that it was a fabrication and a forgery. We called Mr. Ritch in the Hamil-

ton College case and we got very little satisfaction; but we did confront him with a receipt from his firm for this will and codicils, that being the last known account for them that could be obtained. We also called the Clerk from the Surrogate's Office and he testified that they were not there and that the Surrogate's records showed that they had gone out on this receipt. In other words we traced them right up to Mr. Ritch, and Mr. Ritch says he cannot find them. Then we make a motion before Judge La-
F. 2081 combe to strike out Mr. Ritch's plea until he shall produce them. That motion is argued, and a day or two afterwards Mr. Bovee drops into the Surrogate's Office, and after he goes away there is no difficulty in finding the original will and codicils. Now, those are circumstances that I propose to put into this record, because, upon a charge of fraud like this, upon a charge impugning the verity of these documents, such as the evidence so far amounts to, I think we are entitled to show that in the very conduct of the cause these gentlemen, as long as they safely could, deprived us of the opportunity to investigate this fraud. That is plainly competent, it is plainly proper and I submit that the mere mark-
F. 2082 ing in evidence of the motion paper is no ground for the tying up of the further taking of testimony by a certificate to the Court, especially when you have no assurance in the world that the Court will ever have its attention called to it. Now I will withdraw my objection to the certificate being made if you will make it a condition that it shall be put on the motion calendar for to-morrow. I do not propose to have Mr. Bovee tying up our testimony and then letting it drop there.

The Examiner: You have a right to make your offer of these papers on the record, and he has a right to object to them.

Mr. Bovee: And have the objection certified to the Court.

Mr. Sherman: But I think this certificate should be sent to the Court at once.

Mr. Bovee: I offer to go before the Court immediately. I cannot do so tomorrow, as I shall be out of town

Mr. Sherman: I want to go immediately.

The Examiner: Well, I expect the Judge down every moment. I understand the Circuit Court of Ap-
F. 2083 peals has adjourned.

Mr. Bovee: I want to say one thing in answer to what has been said by counsel for the complainants in respect to this will. There is no testimony in this case that I ever appeared in the Surrogate's office—

Mr. Sherman: We have not proved all yet, we have to prove one thing after another. It is only fair to you to say that I am advised that I can prove it. I do not make these statements because I have seen you do anything of the sort, because I have not, but I propose to follow it up by that proof.

Mr. Bovee: I do not know what aspersions are
F. 2084 going to be made on the character of the persons connected with this case. We have had an exhibition of the possibilities in that respect while Mr. Parsons was on the stand. Now it seems there is a suggestion that I am implicated in some way, that I appeared in the Surrogate's office and thereupon the will and codicils were produced. I hope the learned counsel will put me upon the stand upon that proposition. As we are indulging in speculations, I have my theory in regard to the production of that will and codicils.

The Examiner: When Judge Lacombe comes down I will send for you to come over and we will dispose

of this matter right off. That is the best I can do for you.

Mr. Sherman: I want to go on if I can.

Mr. Bovee: I will go on now with anything else that you have, but I desire to get away at 12 o'clock.

Mr. Sherman: That is all, you can cross-examine Mr. Cooper and let him go.

Mr. Bovee: I have no cross-examination of Mr. Cooper.

Mr. Sherman: I ask to have the papers marked
F. 2085 for identification, and I request Mr. Cooper to leave them in the custody of the Examiner.

The papers were marked Complainant's Exhibits Nos. 1, 23, and 4 for identification respectively, March 15th, 1901, C. B.

Mr. Sherman: I will ask another question or two of Mr. Cooper.

8 Q. Do you remember that on a subsequent motion and before there was any decision on this motion, that it was stated in open court before Judge Lacombe that the will and codicils had been found in the Surrogate's Office?

F. 2086 A. I do remember that sir, I do not remember what time it was.

9 Q. Well, so far as you know, is that statement the reason why no formal disposition was made of the motion?

Mr. Bovee: I object to that as incompetent. I think Judge Lacombe is the best one to testify on that subject. I object to it as incompetent, irrelevant and immaterial.

A. That is my understanding of it.

Mr. Sherman: I do not want to call Judge Lacombe on that point.

10 Q. Well, the Judge has sent the papers out, has he? He has them no longer under consideration?

A. No, sir; he has not them under advisement now.

Mr. Sherman: That is all.

Mr. Bovee: I have no questions.

F. 2087

THOMAS M. MARSAC, recalled for further examination on behalf of the complainants, testified as follows:

By Mr. Sherman:

10 Q. Marsac, did you bring here the original will and codicils of Mr. Fayerweather from the Surrogate's Office on a former occasion?

F. 2088 A. Yes, sir.

11 Q. Had you previously under a subpœna made search in the Surrogate's Office for those documents?

A. Not last year.

12 Q. But before that, you testified in the Hamilton case?

A. I did in some other proceeding, that would be two years ago.

13 Q. That was Hamilton College's bill. You testified to the result of that in the Hamilton case?

A. Yes, sir.

14 Q. At that time you made a thorough search for those papers?

A. I did.

15 Q. When did you afterwards first see or find the will and the four codicils of Mr. Fayerweather?

A. I found them on December 3rd, 1900.

16 Q. Where did you find them?

A. I found them in the regular bundle of March wills, 1891, that is, will proved in March, 1891.

F. 2089 17 Q. Do you know Mr. Christian N. Bovee?

A. Yes, sir.

18 Q. When and where did you last see Mr. Bovee prior to your finding of that will and those four codicils?

Mr. Bovee: We object to this as irrelevant and immaterial to the issues presented upon the special pleas, the will and codicils having been produced by counsel for complainants and marked in evidence and photographed.

(At the request of the witness, question No. 18 was repeated by stenographer).

A. Why, I have seen Mr. Bovee in the office

F. 2090 many times.

19 Q. But when last prior to the finding of that will and those four codicils did you see him in the office?

A. I saw him on the day that I found the wills.

20 Q. In the Surrogate's Office?

A. Yes, sir, in the Surrogate's office.

21 Q. In the same office where you found the will and codicils?

A. No, the wills were kept in room 1 and Mr. Bovee was in room 2.

22 Q. Well, are room 1 and room 2 accessible one from the other?.

A. Yes, sir, they are right next to one another.

Mr. Sherman: You may cross-examine.

Cross-Examination by Mr. Bovee:

23 XQ. Mr. Marsac, in the search which you made prior to the occasion when you found the will and codicils, you had searched, had you not in the Fayerweather boxes?

F. 2091 A. Well, I had searched in the Fayerweather box and among the accountings that were filed; we have a bundle of accountings outside of the box.

24 XQ. That was the place where you supposed the will and codicils would properly be found?

A. Well, I also searched in that bundle of wills.

25 XQ. When had you searched in that bundle of wills?

A. At the time that I testified in that former proceeding.

26 XQ. Do you know Mr. William Blaikie?

A. Yes, sir.

27 XQ. Have you on various occasions seen Mr.

F. 2092 William Blaikie in that office?

A. Very often, yes.

28 xQ. On how many occasions before the occasion when you found the will and codicils had you seen Mr. Blaikie in the office in respect to the will and codicils?

A. Well, I could not say as to that; Mr. Blaikie has been in the office probably every week.

29 xQ. Every week?

A. Yes, pretty near.

30 xQ. Had Mr. Blaikie suggested that you should hunt for that will in the tin box and in the accountings?

A. In the last proceeding, not in this proceeding.

31 xQ. No, not in this proceeding.

A. In the last proceeding, yes, sir.

32 xQ. And pursuant to his suggestion you had hunted in those places?

A. Yes, sir, I——

33 xQ. Had Mr. Blaikie——

Mr. Sherman: Wait a minute. Let him finish his answer.

F. 2093 The Witness: I think at that time that I had the bundle of original wills out for March, 1891, and he suggested that they might be put back in there. You know I had a receipt for the will at that time.

34 xQ. You had a conversation with me on the occasion when you saw me in the office, did you not?

A. Yes, sir.

35 xQ. What did I tell you in respect of my desire, if anything, to have that will and codicils found, as to whether I wished them found?

Mr. Sherman: Objected to on the ground that the declaration of the counsel in his own favor is not F. 2094 evidence.

A. I first heard from you through Mr. Bonynge, the Deputy Chief Clerk of the office. He told me that you were very anxious to find the will, he spoke to me about it and asked me if I would not make another search. That was probably—

Mr. Bovee: One moment.

36 xQ. After you had been spoken to by Mr. Bonynge, did you make an effort to find the will?

A. Not at that time, no sir.

37 xQ. Before you saw me had you made another effoat to find it?

A. No, the day you came in.

38 xQ. Then you saw me?

A. Yes, sir.

39 xQ. Well, did I say anything to you about my desire that the will should be found, and if so, what?

Mr. Sherman: Objected to as incompetent, as a naked declaration in favor of the declarment.

A. Well, you appeared to be very anxious to find the will.

F. 2096 40 xQ. Yes.

A. And I thought the will was not on file and I so told you.

41 xQ. Did I ask you where you had searched for that will?

A. Yes, sir.

42 xQ. Did I ask you had searched in every place where you had reason to believe you might find that will and codicil?

A. I believe I did.

43 xQ. Did you receive that will and codicil from me?

A. No, sir, I did not.

F. 2096 44 xQ. I asked you, did I not, if you had searched in the accounting boxes?

A. Yes, sir.

45 xQ. And in the accounts?

A. And in the accounts.

46 xQ. And you said, did you not, that that was the place in which you had reason to expect to find the will and codicils in view of the receipt?

A. Yes, sir.

47 xQ. Then it is not a fact that I asked you if you searched in the wills, original wills of 1901?

A. Yes, sir.

48 xQ. What answer, please, did you make to my inquiry, if you recall?

A. I think I told you that I had made a search in the original wills.

49 xQ. And then what did I say to that?

A. Well, you said, "Try again."

50 xQ. Did you then at that time, while I was present, get down the original bundle?

A. I did.

F. 2097 51 xQ. And did you on that occasion find the original will and codicils of Mr. Fayerweather while I was then there with you?

A. Yes, sir.

52 xQ. Mr. Marsac, do you know when that original will and codicils were put in that bundle?

A. No, sir, I do not. I have no idea. May I state something?

53 xQ. Anything you please, Mr. Marsac?

A. Well, I found the will—you know we have them arranged in alphabetical order, and I found the will I think among the K's, not among the F's; in running through I think I did find it in your presence, I brought the bundle in and found the will I think among

F. 2098 the K's or the L's, it was about that part of the bundle, and it surprised me to find it there.

54 xQ. Then being among the K's and not among the F's it would be out of its regular place?

A. Out of its regular order, yes, sir.

55 xQ. It may be, then that if you did search in that bundle on previous occasions that your search had not been extended into the K's but stopped at the F's?

A. No, sir, that is not the fact.

56 xQ. Is it possible that it is so?

A. No, sir, when I have to testify to a search I make a pretty careful search, Mr. Bovee.

57 xQ. Is it not a fact that when I suggested that you

should look through those original wills that I suggested that you should go through from the beginning to the end of the bundle?

A. Yes, sir, it is.

58 xQ. And upon that occasion in going through from the beginning to the end you found the will and codicils out of their regular order, out of the F's and among the K's?

A. Among the K's, I think it was the K's, the K's or the L's.

F. 2099 59 xQ. So far as you know that will and codicils were never returned to that office by Mr. C. N. Bovee, Jr.?

A. No, sir.

60 xQ. And was never returned, so far as you know, through the instrumentally of Mr. Bovee?

A. No, sir.

61 xQ. Had Mr. William Blaikie been in that office examining the will and codicils prior to that occasion which you have been testifying to?

A. Not the original will, no, sir.

62 xQ. He had not?

A. No, sir.

F. 2100 63 xQ. After the will was taken from the office at the time indicated in the receipt of Mr. MacArthur, do you know when the will and codicils were returned to the custody of your office?

A. I do not.

64 xQ. On the occasion when you found the will and codicils and had your conversation with me, did you not state to me that in the ordinary course of business in that office after the lapse of a year and after a will had been taken from the files upon the receipt of the attorneys for the proponent, you as custodian of wills would not return a will so taken from the files except upon the order of the Court, and that you did

not believe that the will and codicils could be in that file of original wills in 1891?

A. That is right, yes, sir.

65 xQ. And that after you had so stated I said, or Mr. Bovee said, that he did not care, he desired you to make sure by an immediate examination that the will was not in that bundle of original wills of 1891?

A. Yes, sir.

66 xQ. And thereupon you got down the bundle and found the will and codicils as you have testified?

F. 2101 A. Yes, sir.

Mr. Bovee: That is all.

Re-direct Examination by Mr. Sherman:

67 RDQ. Mr. Marsac, did Mr. Bovee as soon as you had found the will and codicils as the result of his insistence, demand the cancellation or delivery of the receipt which Arnoux, Ritch & Woodford had given the Surrogate's office for them?

A. No, sir, I think I remarked, I think I was going to draw up a receipt and have Mr. Bovee take the

F. 2102 will and codicils from the files, but Mr. Bovee said that he did not want to take them from the files, that he wanted them left there. Then I cancelled the receipt and marked it on the record.

68 RDQ. Then the receipt was not cancelled until after Mr. Bovee had insisted on your looking through the bundle of March, 1891, wills, and you had found this will and codicils which was among the K's, is that right?

A. That is right.

69 RDQ. So that the situation is this, the Surrogate's Office had given up the will and codicils to Arnoux, Ritch & Woodford upon their receipt, and when you were formerly subpœnaed to produce those documents

you could produce nothing but their receipt—am I right so far?

A. That is right, yes, sir.

70 RDQ. Subsequently, by some means unknown to you, the will and codicils delivered to Arnoux, Ritch & Woodford are found in the bundle of March wills, 1891, the receipt in the meantime standing in full vigor—is that right so far?

A. That is right, yes, sir.

F. 2103 71 RDQ. And the will and codicils are found out of place in the bundle of wills for March, 1891, on the 3rd of December, 1900, because Mr. C. N. Bovee insisted on your looking there, is that right?

A. Well, Mr. Bovee requested me to look through the wills on that day that he came in the office.

72 RDQ. Notwithstanding that you told him that you thought they could not be there in the absence of a Surrogate's order, is that right?

A. Thati is right, yes, sir.

73 RDQ. Did he give you any particular reason for supposing that you would be sure to find the will and four codicils in that bundle out of place?

A. No, only he thought that I might look
F. 2104 through the bundle while I was there, that being the proper place for them.

74 RDQ. And you told him, did you, that you had previously looked in that bundle without success, and nevertheless he insisted upon your looking through again, is that right?

A. I told him that I had looked through that bundle before and could not find the will, that is, I so testified on the other proceeding.

75 RDQ. And nevertheless Mr. Bovee urged you to look again in that place, did he?

A. Well, he asked me to look in that bundle for the will.

76 RDQ. And that is the way and the time that the will and codicils came to be discovered by you, is that right?

A. Yes, sir.

Mr. Sherman: That is all.

Re-cross-examination by Mr. Bovee:

77 RXQ. Had Mr. William Blaikie ever suggested to you that you should look in this bundle of wills
F. 2105 to find the will and codicils?

A. I think he did on the other trial; that was some two years ago I think.

78 RXQ. When you testified in respect to the Hamilton College plea?

A. Yes, sir.

79 RXQ. These gentlemen were then seeking to find the will and codicils, were they?

A. Yes, sir, they were.

80 RXQ. And Mr. Blaikie was in and out of that office in respect to that matter then, was he?

A. Very often.

81 RXQ. After you found these papers you had a conversation with me in respect to taking the will
F. 2106 and codicils from the office?

A, Yes, sir.

82 RXQ. What did I say to you, Mr. Marsac, about the care of that will and codicils in the future?

A. Why you told me to be very careful of them, and I wanted you to take them away, but you did not care to take them away. You told me to be very careful, and I said I would, I would have them locked up in the safe so that they could be used in the proceeding.

83 RXQ. Whatever may be the suspicions or insinuations of the counsel for the complainants in respect to the return of that will and codicils by Mr. Bovee, Mr.

Marsac, did you believe that Mr. Bovee had returned that will and codicils to that bundle?

Mr. Sherman: Wait a minute. Objected to as improper in form and as incompetent and immaterial.

A. No, sir.

84 RXQ. Mr. Marsac, do you know Mr. John B. Reynolds?

A. I have known Mr. Reynolds coming in the office of the Surrogate.

F. 2107 85 RXQ. Do you recognize him sitting here in the Court room?

A. Yes, sir.

86 RXQ. Has Mr. John B. Reynolds on various occasions been in your office?

A. Yes, sir.

87 RXQ. In the room where the custody of this will and codicils is kept?

A. No, sir.

88 RXQ. In the record room of that office?

A. Yes, sir.

89 RXQ. In your room, in the record room?

A. Yes, sir, in the record room?

F. 2108 90 RXQ. Is not the record room the room in which you found the will and codicils?

A. No, sir, they are locked up in closets outside in room 1.

91 RXQ. Is the record room the room adjoining the room in which the original wills are kept?

A. Yes, sir.

92 RXQ. So that anybody being in the record room has free access in and out of this room where the wills are kept?

A. Why, yes; they are out in room 1, that is where we probate all wills, and the administration papers also.

93 RXQ. So that Mr. Reynolds in the room had free access in and out of this room and to the papers and documents.

A. No.

94 RXQ. No?

A. Nobody has access to those records except the clerks.

95 RXQ. But those records are produced by you at any time upon the request of any parties?

A. That is right.

F. 2109 96 RXQ. And how many times have you seen Mr. John B. Reynolds in that office?

A. Oh, I could not state that; I have seen him quite a number of times.

97 RXQ. You have seen him quite a number of times in that office?

A. Generally with Mr. Blaikie.

98 RXQ. Hunting around for these papers?

A. No, examining the contents of the box.

By Mr. Sherman:

99 RDQ. In the course of bnsiness, Mr. Marsac, in the Surrogate's office, some one from the firm of Arnoux, Ritch & Woodford, they having receipted for F. 2110 the will and codicils, must have at some time restored them to the files of the Surrogate's Court, is it not so?

A. I would not testify to that, sir; there are other clerks besides me in the room.

100 RDQ. I do not mean to the point of getting them into the hands of the clerks, but somebody from Arnoux, Ritch & Woodford must have restored the will and codicils to some clerk of the Surrogate in order to have them get into that bundle, is it not so?

Mr. Bovee: I object to the question as incompetent, irrelevant and immaterial, and calling for an opinion and not a fact.

A. Somebody from Arnoux, Ritch & Woodford's office?

101 RDQ. Can you think of any way by which the will and codicils, having been once delivered to Arnoux, Ritch & Woodford and their receipt taken for them, could have gotten back into that bundle unless Arnoux, Ritch & Woodford, or some clerk representing them, had returned them to the Surrogate's Office?

Mr. Bovee: I object to it as incompetent in calling for the opinion of Mr. Marsac and not for a fact.

F. 2111 The Witness: Shall I answer?

Mr. Sherman: Yes.

A. Well, the only way as I understood it there was a case before Judge Truax in which they testified that the will was used up there in the Court. That is of course after the receipt was given in our Court for them. Then if it was put away by any other clerk—I know that I never put that will in the bundle.

102 RDQ. My point is very simple, Mr. Marsac. This will and codicils go out of the Surrogate's office on the receipt of Arnoux, Ritch & Woodford; now on the 3rd of December you find them in the March, 1891, bundle of wills?

A. Yes, sir.

F. 2112 103 RDQ. They must have been put there by some clerk of the Surrogate's office, must they not, in the course of business?

A. I think so.

104 RDQ. And in order to get them them there they must have been returned by some clerk of Arnoux, Ritch & Woodford, in the course of business, no matter what happened to them in the meantime?

A. I would not testify that Arnoux, Ritch & Woodford returned the papers.

105 RDQ. Did Mr. Blaikie return them?

A. No, he did not.

106 RDQ. Did Mr. John B. Reynolds return them?

A. No, he did not.

107 RDQ. Can you explain how it would be possible for Mr. Blaikie or Mr. John B. Reynolds to put them back in the bundle unless they got them from Arnoux, Ritch & Woodford?

A. No, they were very anxious to get hold of them.

108 RDQ. Do you know of any fact which gives any color to the insinuation of this counsel that these things had been put there by Mr. John B. Reynolds
F. 2113 or Mr. Blaikie and not by Mr. Bovee?

Mr. Bovee: I object to the question as incompetent and not calling for a fact.

A. I do not.

By Mr. Bovee:

109 RXQ. You say there are other clerks in that office who might have received those papers on their return other than yourself, Mr. Marsac?

A. Yes, sir.

By Mr. Sherman:

110 RDQ. Did Mr. Bovee tell you when he inspired you to find this will and codicils that he want-
F. 2114 ed you to go and tell Mr. Blaikie that they had been found?

A. No, sir.

111 RDQ. Did he say anything on that subject to you?

A. No, sir.

Mr. Sherman: That is all.

Mr. Bovee: I move to strike out all the testimony of Mr. Marsac as irrelevant and immaterial, the will and codicils having been found by the counsel for the complainants and produced in evidence here. Is that all to-day, Mr. Sherman?

Mr. Sherman: How about this certificate of yours?

Mr. Bovee: I understand the Judge is still in consultation.

Mr. Sherman: Mr. Examiner, I ask you to certify this objection so that it can go on the motion calendar to-morrow.

Mr. Bovee: I cannot be here to-morrow. I will
F. 2115 bring my certificate on when I see fit.

Mr. Sherman: I submit that this certificate ought to be reserved to the end of the case unless he brings it up to-morrow. He has no right to tie up our testimony indefinitely in that way.

Mr. Bovee: I shall be ready to argue this at the next motion calendar next week.

Mr. Sherman: I ask you to withdraw the certificate until it is properly made. You cannot tie up our case in that way.

F. 2116 Mr. Bovee: I will be ready next week.

Mr. Sherman: Complainants testimony is closed.

Signed,

THOMAS M. MARSAC,

Signed and sworn to before me this }
10th day of Feb., 1902. }

JOHN A. SHIELDS,

Examiner.

COMPLAINANTS' PROOF.

NEW YORK, May 31st, 1901.

Present: The Examiner, Mr. Bovee, Mr.
F. 2117 Sherman, Mr. Blaikie, Mr. Carnochan, Mr. Fain, and a representative of Nash & Jones.

Mr. Sherman: Counsel for complainants states that the record stating that the complainants' proofs are closed so states by error, and that there was no conscious announcement by counsel for complainants of any such thing, and that they repudiate the record in that respect and insist that they have not closed their testimony; and we adjourn the taking of our proof to the same time and place as the defendants adjournment.

Mr. Bovee: Counsel for the defendants states
F. 2118 that it was expressly stated by Mr. Sherman counsel for complainants that complainants closed their proofs; that the record correctly states the fact in that respect. and we object to any further extension of time for complainants to take proofs in view of that fact.

Mr. Sherman: Counsel for complainants states that he never made any announcement of closing his testimony except that the taking of testimony under the pending notice was closed, and according to his recollection such statement as he made was coupled with a statement that he would give notice of any further testimony which it was intended to take, that the announcement was not an

announcement of the general closing of complainants proofs in the case; and wishes counsel for the defendants to govern themselves accordingly and not be misled by their misunderstanding on that point.

Adjourned to June 7th, 1901, at 2 p.m.

F. 2119 NEW YORK, June 7th, 1901.

Met pursuant to adjournment. Present:— The Examiner, Mr. Blaikie, Mr. Bovee, and a representative of Messrs. Root, Howard, Winthrop & Stimson.

Adjourned to June 11th, 1901, at 2 p. m.

F. 2120

IN THE CIRCUIT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

EMMA S. FAYERWEATHER and another,
Complainants,
against
THOMAS G. RITCH and others,
Defendants.

F. 2121

In Equity No. 6675.

JOHN B. REYNOLDS, as sole Executor of the Estate of Lucy Fayerweather, deceased,
Complainant,
against
THOMAS G. RITCH, and others,
Defendants.

F. 2122

In Equity No. 6675.

EMMA S. FAYERWEATHER,
Plaintiff,
against
JOHN E. PARSONS, and other,
Defendants.

F. 2123

MARY W. ACHTER,
Plaintiff,
against
JOHN E. PARSONS, and others,
Defendants.

F. 2124

JOHN B. REYNOLDS, Executor,
Plaintiff,
against
JOHN E. PARSONS, and others,
Defendants.

MARY W. ACHTER,
Plaintiff,
against
UNITED DRESSED BEEF COMPANY OF NEW YORK,
Defendants.

F. 2125

ANNER A. REYNOLDS,
Plaintiff,
against
UNITED DRESSED BEEF COMPANY OF NEW YORK,
Defendant.

F. 2126

Deposition of *ALBION M. DYER*, a witness for the complainants and plaintiffs, in each of the above entitled suits and actions taken at the office of Louis W. Marcus, Surrogate of the County of Erie, State of New York, in the City and County Hall in said County, before the said Surrogate, on the 13th day of May, 1901, and by adjournment as hereinafter stated, on the 14th day of May 1901, pursuant to Section 863 of

the Revised Statutes of the United States, pursuant to the annexed notices.

On the 13th day of May 1901, at two thirty p. m. at the same place, appeared William Blaikie, of counsel, for said complainants and plaintiffs, whereupon the said surrogate having received the telegram hereto annexed, and Mr. Seward A. Simons, appearing in person on behalf of Mr. Christian N. Bovee, of counsel for the defendants named below, and requesting an adjournment of the taking of said deposition
F. 2127 it was, by consent of said counsel for the complainants and plaintiffs above named, adjourned to proceed at seven o'clock p. m., on said 14th day of May 1901, at the same place.

Whereupon, pursuant to such adjournment the complainants and plaintiffs attended by Roger M. Sherman and William Blaikie, their counsel, and Mr. Christian N. Bovee, appeared for the defendants, Ritch, Bulkely and Vaughan, Marietta College, Cornell University, Manhattan Eye and Ear Hospital, Yale College, Wesleyan University, John E. Parsons and Edward M. Grout.

And thereupon, said Albion M. Dyer, a witness of lawful age, called on behalf of said complainants and plaintiffs, and residing in the City of Buffalo, in
F. 2128 the County of Erie and State of New York, more than one hundred miles from the City of New York, the place where the above entitled suits and actions are and each of them is to be tried, being first duly cautioned and sworn, to tell the truth, the whole truth, and nothing but the truth, and being carefully examined upon his oath, deposes and says as follows:

Direct examination by Mr. Sherman.

1 Q. Please state your name, age and residence.

A. Albion Morris Dyer, aged 42, residence, Warren, O.

2 Q. Are you presently residing in Buffalo?

A. I am sojourning in Buffalo.

3 Q. If your sojourn is temporary, so state, and state where you intend to go to reside when your sojourn in Buffalo is ended?

A. I expect to return to Warren, Ohio, but not at present. It is indefinite.

4 Q. Are you a graduate of any college?

A. I am a graduate of Madison University, now called "Colgate" at Hamilton, N. Y.

5 Q. Are you acquainted with Edward M.
F. 2129 Grout? If so how long have you known him?

A. I knew Mr. Grout since the Fall of 1881.

6 Q. What was your year of graduation at College?

A. 1884.

7 Q. Was he in that class?

A. Yes.

8 Q. Did you see him in years 1891 and 1892? If so, where?

A. I was back in New York from a western trip in summer of presidential election 1891. I remember the date by the Presidential Election; from the time of my return to New York. I saw Mr. Grout frequently until 1895. I have not seen him since. I saw him in New York City and Brooklyn.

F. 2130 9 Q. Have you recently talked with Mr. Grout over the telephone between Brooklyn and Buffalo?

A. I talked with Mr. Grout over the telephone a few days ago. I was in Buffalo. I do not know whether Mr. Grout talked from Brooklyn or not.

10 Q. On that occasion did Mr. Grout refer to a conversation between yourself and him which occurred in 1891 or 1892?

Objected to as incompetent, and improper in form.

Question withdrawn.

11 Q. Did Mr. Grout in conversation with you refer

to his contemplated partnership with Mr. Wm. J. Gaynor?

Same objection.

A. Yes, sir.

12 Q. About that time did Mr. Grout say anything to you concerning his connection with the execution by Daniel B. Fayerweather on the day of Mr. Fayerweather's death of a codicil to Mr. Fayerweather's will?

A. Before that conversation, he talked to me about the execution of the Fayerweather Will.

F. 2131 13 Q. Once, or more than once?

A. Once, that I could swear to, and perhaps other times; but once that I could swear positively to.

14. Where did the conversation occur which you particularly recall?

A. I think it was Judge Woodford's office No. 18, Wall Street. I recall the conversation more particularly than I do the place.

15 Q. Do you recall when that conversation took place?

A. It was between the time of my return to New York and the time of Ed. Grout's going to Judge Gaynor's office in Brooklyn.

16 Q. Did Mr. Grout tell you that he was a wit-

F. 2132 ness tothe codicil made by Daniel B Fayerweather of New York City upon the day that he died?

Objected to as incompetent, and leading, and irrelevant and immaterial.

A. I remember Mr. Grout saying he was a witness to the signing of the Fayerweather will.

17 Q. Did he tell you that Mr. Fayerweather at that time was in no condition to resist?

Objected to as incompetent, irrelevant and immaterial to the issues presented in the above cases, and no proper

foundation has been laid for the testimony of this witness. The witness, Grout, having only been examined in case of Emma S. Fayerweather and ano. vs. Thomas G. Ritch, et. al. in Equity No. 6675, and in the cross-bill John B. Reynolds vs. Thomas G. Ritch, et. al., same number.

A. I cannot answer that categorically.

18 Q. I wish you to give the precise words, if you can; if you cannot give precise words, please say so?

F. 2133 And give the substance of the inquiry and kindly answer questions in that sense.

Objected to upon the grounds last above stated; and further ground, that the matters inquired of, not being as to any issue raised by pleadings, the witness is limited to categorical answer in denial of testimony given by Mr. Grout.

A. I carried that impression away from the conversation.

Mr. Bovee moves to strike out answer as incompetent and not responsive, and on all other grounds

F. 2134 above stated.

19 Q. Have you an impression upon your memory of the words that Mr. Grout used precisely in that conversation?.

Objected to as incompetent.

A. Not of the words.

20 Q. Have you an impression upon your memory or the substance of what Mr. Grout said on that occasion.

Same objection.

A. Yes.

21 Q. Did Mr. Grout on that occasion tell you in substance that Mr. Fayerweather at that time was in no condition to resist?

Objected to as irrelevant and immaterial to issues; incompetent, improper in form, calling for a conclusion of witness, not of fact, no proper foundation has been laid. The matter sought to be elicited not being at issue, the witness is confined to categorical denials of testimony given by Grout in the bill and cross-bill in which he was examined.

F. 2135

A. Such is my impression.

Mr. Bovee moves to strike out answer of witness on grounds above stated, and not responsive.

22 Q. What is your recollection?

Same objection.

A. My recollection is that he did.

Mr. Bovee moves to strike out answer on same grounds.

23 Q. Did Mr. Grout on that occasion tell you in substance that Mr. Fayerweather was so feeble that he was unable to sign without help?

Same objection as above.

F. 2136

A. I can't answer that categorically. I will have to explain my answer.

24 Q. Go right on?

Mr. Bovee objects to witness making any further statement on the grounds above stated, and the witness having already stated that he can not give a categorical answer.

A. My answer is this: I carried away that impression from my conversation with Mr. Grout.

Mr. Bovee moves to strike out the words "I carried away," etc., upon grounds above stated.

25 Q. What is your recollection as to whether Mr. Grout in that conversation told you that Mr. Fayerweather was so feeble that he was unable to sign without help?

Same objection.

A. Such is my recollection.

I move to strike out on all grounds above stated.

26 Q. What is your recollection as to whether Mr. Grout told you on that occasion that he guided Mr. Fayerweather's pen as he was not capable of

F. 2137 writing without it?

Same objections as above.

A. I recollect no words or sentences used by Mr. grout on that subject, but that is the impression I carried away from the conversation.

Mr. Bovee: I move to strike out the expression "that is the impression I carried away" as not responsive, incompetent, giving the conclusion of the witness, not fact; irrelevant and immaterial; not in categorical denial of Mr. Grout.

F. 2138

27 Q. What is you recollection as to whether or not Mr. Grout on that occasion told you in substance that he guided Mr. Fayerweather's pen, as he was not capable of writing without assistance?

Same objection.

A. In substance, yes.

Mr. Bovee moves to strike out answer as not responsive, and on same grounds.

28 Q. Did Mr. Grout on that occasion tell you in sub-

stance that he found Mr. Fayerweather so weak, that he could not write his name without help, and that Mr. Grout assisted Mr. Fayerweather in doing so?

Objected to as incompetent, irrelevant and immaterial to the issues. No proper foundation has been laid. Witness is confined to categorical denials to testimony given by Mr. Grout in above cases in which he was examined.

F. 2139 A. I carried that impression away from the conversation.

I move to strike out answer on all grounds above stated; gives conclusion of witness and not fact.

29 Q. What is your recollection as to whether on that occasion, Mr. Grout told you in substance that he found Mr. Fayerweather so weak that he could not write his name without help, and that Mr. Grout assisted Mr. Fayerweather in doing so?

Same objection.

A. Having no recollection of any words or sentences, but remembering well the general effect of Mr. Grout's words, I so recollect.

F. 2140

Mr. Bovee moves to strike out answer on grounds above stated.

30 Q. Did Mr. Grout say anything about Mr. Ritch's connection with the occurrence? If so, what?

Objected to as irrelevant, immaterial, and incompetent. No proper foundation has been laid for the testimony.

A. He told me, how he happened—how Grout happened to be connected with the will, and that involved Mr. Ritch's name. He (Grout) said Mr. Ritch had taken him from Mr. Woodford's office to perform this

service for Mr. Ritch as representing Mr. Ritch at the signing of the will. Grout had gone to the Fayerweather house at the request of Mr. Ritch.

31 Q. Did you ever see Thos. J. Middleditch in Mr. Grout's company?

A. I could not say I had. I don't think so.

32 Q. Have you any knowledge as to the acquaintance between Thos. J. Middleditch and Edward M. Grout?

F. 2141

Objected to as irrelevant, immaterial and incompetent.

A. I have no knowledge on the subject.

33 Q. What fact do you know relating to their acquaintance?

Objected to as incompetent. Witness has already answered he has no knowledge.

A. Middleditch was well known around Hamilton, and Mr. Grout was a man who had moved around among people in Hamilton; Hamilton being a very small town.

F. 2142 Upon the cross-examination by Mr. Bovee, as Counsel for the defendants herein above specified, it is

Consented—on behalf of the above named Complainants and Plaintiffs, that such cross-examination may be taken down by the typewriter, under the direction of the Surrogate, in lieu of being written out by the Surrogate, or the witness; and that the provisions of Section 863 and 864 of the Revised Statutes, requiring the deposition to be taken by the officer or the witness, is waived. That such cross-examination so taken shall be available only to the defendants, for whom Mr. Bovee appears, as above stated.

And it is further stipulated, by and between said Complainants and Plaintiffs, and the defendants above

named for whom Mr. Bovee appears, that the re-examination, if any, may be taken in the same manner.

1 XQ. Where do you reside in the City or Buffalo?

A. No. 226 Niagara street.

2 XQ. How long have you resided there?

A. I have resided there for about a month.

3 XQ. Where did you reside prior to your taking up your residence?

A. No. 132 Chippewa street.

F. 2143 4 XQ. In Buffalo?

A. Yes, sir.

5 XQ. How long did you reside at 132 Chippewa street?

A. For about five months.

6 XQ. Where did you reside prior to that?

A. At my home, in Warren, Ohio.

7 XQ. How long had you been living up to the time in Warren, Ohio, prior to the time that you came to live on Chippewa street in Buffalo?

A. About 5 years.

8 XQ. In that period of five years were you living continuously in Warren, Ohio?

A. That was my home.

F. 2144 9 XQ. In that period of five years were you living continuously in Warren, Ohio?

A. Yes, sir.

10 XQ. Prior to that five years in which you resided in Warren, Ohio, where you were living?

A. In New York: by New York I mean in and around New York. I will specify the place if you wish to know. I lived at Far Rockaway, and at Hastings-on-the-Hudson, and in New York City; and I think perhaps I lived for a little time in Brooklyn.

11 XQ. What period of your time did your residence in Far Rockaway, Hastings-on-the-Hudson, New York and Brooklyn, cover?

A. It began with the Summer of 1891.

12 XQ. And ran down to what year?

A. To 1895.

13 XQ. From 1891 to 1895, were you living in Far Rockaway, Hastings-on-the-Hudson and Brooklyn, and New York. How much of that time were you living in Far Rockaway?

A. About a year.

14 XQ. What year.

F. 2145 A. I think it was the second year of that period.

15 XQ. In 1892?

A. Yes, sir.

16 XQ. Where in 1893 were you living in New York City?

A. 477, 4th Avenue.

17 XQ. Is 477, 4th Avenue the only place that you resided in the City of New York from 1893 to 1895?

A. No, sir, I lived at 33, West 60th Street.

18 XQ. How long did you reside at 33 West 60th Street?

A. One year.

19 XQ. How long did you reside at the place

F. 2146 that you have indicated on 4th Avenue?

A. About half a year.

20 XQ. How long did you live at Hastings-on-the Hudson?

A. I lived there about a year.

21 XQ. Was your residence at Hastings-on-the-Hudson continuous?

A. Yes, sir.

22 XQ. With whom did you reside there?

A. I resided there with my family.

23 XQ. In what year were you at Hastings?

A. It was the last year of the period.

24 XQ. What year was that?

A. That would be 1895.

25 XQ. Did you keep house there or live with somebody else, Mr. Dyer?

A. I kept house there.

26 XQ. How long did you reside at Far Rockaway?

A. I resided there one summer.

27 XQ. What summer was that, of what year?

A. I think it was the summer of 1893; I think so; I can tell better by my memorandum.

28 XQ. In what year did you live in the city or
F. 2147 Brooklyn?

A. In 1891.

29 XQ. How long did you reside there?

A. A few months only.

30 XQ. Where did you live there?

A. At the Hotel St. George.

31 XQ. Prior to this period in which you state that you lived in the City of New York, Brooklyn, Far Rockaway and Hastings-on-the-Hudson, where did you reside?

A. In Omaha, Nebraska.

32 XQ. How long did you reside in Omaha, Nebraska.

A. Three years.

F. 2148 33 XQ. In the City continuously in that period?

A. Yes, sir.

34 XQ. And prior to your taking up your residence in Omaha, Neb. Where did you reside?

A. In New York.

35 XQ. And how long did you reside in New York from that period?

A. From May 1887 until August 1889, if I remember correctly.

36 XQ. Prior to that where did you reside?

A. Prior to that I was a bachelor and I lived in Ohio.

Proceedings adjourned on the consent of all parties to May 15th, 1901, at the same place.

Pursuant to adjournment: Same appearances. May 15th, 1901, at 7:30 p.m., same place.

37 XQ. What is your business?

A. I am a newspaper reporter.

38 XQ. How long have you been so engaged?

F. 2149 A. Since my graduation.

39 XQ. Continuously employed as a newspaper reporter since your graduation from college?

A. With some intermissions.

40 XQ. What other occupations have you been engaged in since your graduation from college?

A. I ran a printing office; and I taught school.

41 XQ. Where did you run the printing office, and in what period of time?

A. I ran a printing office in Omaha, the time I was there.

F. 2150 41½ XQ. How long was that?

A. Three years.

42 XQ. Was that the only time that you ran a printing office? Was that the only other occupation you have been engaged in besides newspaper reporter since you graduated from college?

A. I answered a moment ago I taught school.

43 XQ. Where did you teach school?

A. In Akron, O.

44 XQ. How long?

A. Two and a half years.

45 XQ. Are those the only occupations that you have been engaged in?

A. Yes, sir.

46 XQ. In the period that you have referred to, from 1891 to 1895, when you were in and about New York City, was your occupation that of a newspaper reporter?

A. Yes sir.

47 XQ. What newspapers were you on?

A. When I first returned to New York during the presidential election I secured a place on the Herald, as Brooklyn correspondent for the Evening Telegram. I kept that until May, when I went to the

F. 2151 New York World.

48 XQ. May of what year?

A. The year of the presidential election.

49 XQ. What year was that?

A. The presidential election was in 1890. That would be 1891, May.

50 XQ. Is your recollection of those facts as distinct as the matters to which you testified upon the direct examination?

A. My recollection as to those matters of my connection with the newspapers, the date of year, is not so distinct, for the reason that in thinking of it entirely as associated with the presidential election.

51 XQ. When was the presidential election?

F. 2152 A. I understand the presidential election year is divisible by four. I think 1890 is divisible by four.

52 XQ. Your recollection is that the president was elected in 1890?

A. Yes sir.

53 XQ. What president was elected in 1890?

A. I think it was Grover Cleveland.

54 XQ. Yon are sure that Grover Cleveland was elected iu 1890?

A. I didn't think so.

55 XQ. You are sure a president was elected in 1890?

A. Yes sir.

55. XQ. Are you as sure that there was a presidential election in 1890 as you are of the conversation which you testified to with Mr. Grout?

A. No sir.

56 XQ. How long did you continue your employment with the Evening Telegram and New York Herald?

A. I have answered that—from November until the following May.

57 XQ. From November of what year?

A. Of the year of that presidential election.

F. 2153 58 XQ. I will ask you to answer my question.

Objected to on the ground that the inquiries for the year are already responsively answered by the reference to the presidential election year; and what that year was, by the calendar is judicially known to the court or is a matter of computation.

59 XQ. Are you able to tell me without reference to the year of the presidential election, when it was that you begun your employment with the Evening Telegraph; of what year?

A. Not without refreshing my memory by a reference to a memoranda.

F. 2154 60 XQ. When did you terminate your employment with the Evening Telegraph?

A. In the May following.

61 XQ. Following what?

A. Following that November that I have already answered. I have answered that question that I worked for the Telegram from November to the following May.

63 xQ. Were you then engaged on any other paper; and if so, what?

A. On the New York World.

64 xQ. When did you begin your employment with the New York World?

A. About 20 minutes after I left the employment of the Telegram.

95 xQ. In what year was that?

A. The year following that presidential election to which I have referred.

66 xQ. Was that in the year 1890?

A. I don't know whether you mean the presidential election or my going on the World. They were in two different years.

67 xQ. Are you able to tell me the year with-
F. 2155 out reference to the presidential election in which began your employment with the New York World?

A. My answer is, not without referring to memorandum.

68 xQ. How long did you continue as a newspaper reporter on the New York World?

A. I will answer that in this way: Because I am not able to give the day or the year without referring to memorandum. It was at the time of the trial of Doctor Briggs for Heresy in the Scotch Presbyterian Church on 14th Street in New York City. At that time I went to work for Colonel Shepard on the Mail Express.

69 xQ. Is that the nearest you can come to tell-
F. 2156 ing me when you begun your employment on the New York World?

A. I did not begin my employment with the World at that time. I terminated it at that time.

70 xQ. Now are you able to tell me the year in which you terminated your employment with the World?

A. Not without reference to memoranda.

71 xQ. How long were you employed on the World?

A. I think it was about 3 years. 2 or 3 years. I can't remember exactly.

72 xQ. Are you able to tell me the year in which you terminated your employment with the World?

A. Same answer as I answered before to that. I answered that question once before.

73 xQ. Is that the best answer you can make to my question?

A. No, sir.

74 xQ. Will you answer my question?.

A. I will.

75 xQ. I will thank you to do so.

A. Not without reference to memoranda.

76 xQ. That is the best answer you can make F. 2157 to my question, is it.

A. Yes sir.

77 xQ, When you left the World what other paper did you go on?

A. The Mail & Express.

78 xQ. Are you able to tell me the year in which you began your work on the Mail & Express?

A. I associated entirely with the event I have referred to—I cannot answer it by giving the year, without reference to memoranda.

79 xQ. How long did you remain on the Mail & Express?

A. Until about 6 months after Col. Shepard died.

80 xQ. Is that the best answer you can give F. 2158 to my question?

A. I can associate it with another event.

Mr. Bovee: Mr. Examiner I think it is within your province in conducting this examination, to direct the witness to answer the question.

The Examiner directs the witness to answer the question.

A. If you mean by that, a year, I can not do better, without reference to memorandum.

81 xQ. Are you able to say whether you were engaged on the Mail & Express for a year?

A. I am.

82 xQ. Give me your best recollection as to the period of time that you were engaged on the Mail & Express.

A. I think it was about a year.

83 xQ. Were you connected with any papers other than those that you have stated?

A. I worked for the United Press.

84 xQ. Was that before or after that you worked for the Mail & Express.

F. 2159 A. I left the Mail & Express to join the United Press.

85 xQ. How long did you remain with the United Press.

A. Until the United Press went out of existence.

86 xQ. Are you able to tell me in what year that was?

A. I can not give you the year.

87 xQ. Were you connected with the United Press for a year?

A. Yes sir. For more than a year.

88 XQ. How much more than a year?

A. More than two years if I remember correctly.

89 XQ. Are you able to tell me the year in which your connection with the United Press terminated?

F. 2160 A. Not without reference to memoranda.

90 XQ. Did you go to any other paper after you left the United Press?

A. Not for some years.

91 XQ. Was it before or after the year 1895 or in the year 1895 that you severed your connection with the United Press.

A. After.

92 XQ. What did you after you left the United Press?

A. For one year and a half I nursed my sick wife.

93 XQ. Where?

A. In Ohio.

94 XQ. Was it while you were in New York that you were connected with the United Press ?

A. I moved to Ohio while I was connected with the United Press.

95 XQ. How long had you been on the United Press when you moved to Ohio?

A. About one year.

96 XQ. From the period in 1891 to 1895, have you told us all that you did in the City of New York, referring to your occupations?

A. Substantially.

97 XQ. Did you graduate in the same class as
F. 2161 Mr. Grout at College?

A. Yes, sir.

98 XQ. How long have you known Mr. William Blaikie?

A. I met him first in 1883 or 4; 1883 I think?

99 XQ You have been acquainted with him since that time, have you?

A. No, sir. You asked me how long I knew him.

100 XQ. Do you know Jno. B. Reynolds?

A. Yes, sir.

101 XQ. How long have you known him?

A. About three weeks.

102 XQ. When were you first spoken to in respect to your giving testimony in this case?

F. 2162 A. About three weeks ago.

103 XQ. By whom?

A. I think Mr. Reynolds.

104 XQ. That is Jno. B. Reynolds, one of the Plaintiffs here?

A. Yes, sir.

105 XQ. Where was that?

A. In this Building.

106 XQ. Had you communicated with Mr. Reynolds on that subject before that?

A. No, sir.

107 XQ. Had you ocommunicated with Mr. Blaikie before that?

A. No, sir.

108 XQ. Was Mr. Blaikie with Mr. Reynolds at that time?

A. No, sir.

109 XQ. How many times had you spoken with Mr. Reynolds upon that subject before you examination begun yesterday?

A. Three or four times.

110 XQ. Here in Buffalo?

A. Yes.

F. 2163 111 XQ. How many times had you talked with Mr. Blaikie in respect to your testimony (?) before your examination yesterday?

A. Two or three times.

112. XQ. Had you talked with Mr. Sherman upon the same subject?

A. Is that question qualified the same as the other, before this examination.

113. XQ. Certainly. A. No sir.

114 XQ. In answer to direct question 13 you testified: "Once that I could swear to, and perhaps other times; but once that I could swear positively to." You remember giving that testimony yesterday?

A. I remember giving that answer. But I do F. 2164 not remember what it was.

115 XQ. You were asked upon your direct examination question 14—"Where did the conversation occur which you particularly recall?" You answered, "I think it was in Judge Woodford's office, No 18 Wall street. I recall the conversation more particularly than I do the place." You remember that testimony?

A. Yes sir.

116 XQ. Are you able to tell me the year in which you had the conversation which you referred to in that answer?

A. No sir.

117 XQ. Are you able to say if it was in the year 1893?

A. No, sir.

118 XQ. 1894?

A. I think both of those years are later than the year of the conversation.

119 XQ. What is your best recollection Mr. Dyer?

A. My best recollection is that the conversation occurred at some time between my return to New York from Omaha, the time I referred to as the time of the presidential election, and Mr. Grout's leaving Governor Woodford's employ to take a position in Mr. Gay-
F. 2165 nor's office in Brooklyn. I am positive that the conversation occurred between those two events. I can not tell the year in which the conversation took place.

120 XQ. You have said, have you not, that the presidential election was in 1890?

A. No sir.

121 XQ. Isn't that your recollection?

Mr. Sherman: I object to it on the grounds that the subject has been exhaustively answered already, and that the witness has already repeated himself that he has no arbitrary memory of calendar dates, but that he remembers the events testified to solely by their re-
F. 2166 lation to other events; and on the ground that the pursuit of that topic is an abuse of the right of cross-examination.

A. I can not recollect without referring to memoranda.

122 XQ. How long did this conversation with Mr. Grout last?

A. Oh, I think we were half an hour or a little more perhaps in the office. I had many conversations with Mr. Grout.

Mr. Bovee: I object to the witness answering any

further inasmuch as he has already answered the question."

Witness states: I do not consider that I have answered the question.

Witness continues: During this period.

123 XQ. Who was present at that conversation in Mr. Woodford's office on that occasion besides you and Mr. Grout?

A. Mr. Grout and myself.

124 XQ. Anybody else?

F. 2167 A. In the same room?

125 XQ. Yes.

A. No sir, not in the same room.

126 XQ. That conversation was at 18 Wall Street?

A. Yes, sir.

127 XQ. In what month of the year did that conversation take place?

A. I have no recollection of the month.

128 XQ. Do you know the day of the week?

A. No, sir.

129 XQ. Or the time of the day?

A. No, sir.

130 XQ. What newspaper were you connected with at the time you had that conversation with Mr.

F. 2168 Grout?

A. It was either the Telegram or the World.

131 XQ. Do you know which?

A. I can not say which.

132 XQ. You are positive it was one or the other?

A. No. I am positive only—I am positive only of the fact that it occurred at some time between the two events stated.

133 XQ. In that conversation with Mr. Grout were any other subjects discussed between you and him other than the matters to which you have testified?

A. I don't associate any other topic with that particular conversation; although I discussed many top-

ics of current interest with Mr. Grout at various times.

134 XQ. I am speaking about that occasion, Mr. Dyer; is it your recollection that no other subject was discussed in that conversation?

A. I recollect no other subject.

132 XQ. In your conversations with John B. Reynolds, did he tell you anything about the execution of a codicil to the will of Daniel B. Fayerweather?

A. He spoke about the execution of the codicil.

F. 2169 136 XQ. Did he tell you that the hand of Mr. Fayerweather had been held by Mr. Grout?

A. I think he said so, yes.

137 XQ. Did Mr. Blaikie tell you the same? A. Yes.

138 XQ. How many times did John B. Reynolds tell you that?

A. I think once or twice. I don't know of the second time, but I remember well the first time.

139 xQ. Did Mr. Reynolds also tell you that when the codicil was signed by Mr. Fayerweather? He did not know him; Reynolds did not know Fayerweather;

A. No.

140 xQ. Did he tell you that up to that time he had never seen Daniel B. Fayerweather?

F. 2170 A. No.

141 xQ. Mr. Dyer, are you able to swear that in that conversation which you had with Mr. Grout, Mr. Grout told you that Mr. Fayerweather was so feeble that he was unable to sign without help?

A. I can not swear to the words; but in substance, the words made that impression on my mind.

Mr. Bovee: I move to strike out the answer as not responsive to the question.

142 xQ. I repeat my question, Mr. Dyer, ask you again if you are able to swear that Mr. Grout stated to you, in that conversation, that Mr. Fayerweather was so feeble that he was unable to sign without help?

A. I repeat my answer.

143 xQ. Is that the best answer you can make to my question?

A. Yes sir.

144 xQ. Your best answer then, is that what Mr. Grout may have said, made that impression on your mind. Is that what you mean?

A. That is exactly what I mean.

145 XQ. You mean then that it is impossible for you to give the substance of what Mr. Grout said with

F. 2171 reference to that?

A. Yes.

146 XQ. That is all.

Re-direct-examination by Mr. Sherman:

1 RDQ. When you say that you cannot give the substance of what Mr. Grout said, do you mean to be understood that you have, in stating the impression left upon your memory stated anything else but the substance of Mr. Grout's statements to you.

Objected to as improper in form; and as incompetent.

A. I meant by my answer that I could not give

F. 2172 the substance in any such form of words, such as you framed in your question.

2 RDQ. Wherever you have—

A. I want to correct the antecedent of that word "You". I mean by "You" Mr. Bovee.

3 RDQ. Wherever you have undertaken to testify to your recollection of what Mr. Grout said, have you embodied in your answer anything but the impression created and left upon your memory as to the effect and meaning of the statements made by Mr. Grout to you?

Objected to as incompetent, improper in form, and calling for the opinion and conclusion of the witness.

A. My answer is—No.

2 RDQ. When was the last presidential election?

A. In 1900.

4 RDQ. When was the last presidential election preceding that?

A. That would be 1896.

5 RDQ. When was the last presidential election preceding 1896?

A. 1892.

6 RDQ. Do your answers fixing occurrences with reference to a presidential election refer to the
F. 2173 presidential election held in November 1892?

A. Yes; I see now that that is the fact.

7. RDQ. Is it the habit of your memory to remember events with relation to arbitrary dates, or with reference to connected or related events.

Objected to as improper in form and incompetent.

A. I associate events of history that pass through my mind in my own experience with other events, rather than with the calendared dates. A teacher told me that there were only three dates in history worth mentioning. That was Dr. Dodge.

8 RDQ. Was the presidential election of 1892
F. 2174 one of them?

A. No sir; that was not. Dr. Dodge was dead at that time.

9 RDQ. You have said that Mr. Reynolds mentioned to you the execution of a codicil to the will of Daniel B. Fayerweather; and that he told you that Mr. Fayerweather's hand was propelled by Grout. Were those statements by Mr. Reynolds, made before or after you had told him what you recalled of Mr. Grout't statements to you?

A. After.

10 RDQ. Did Mr. Reynolds or did Mr. Blaikie make any statements whatever to you as to the circumstances

of the execution of the codicil until after you had stated to Mr. Reynolds your recollection of the statement made to you by Mr. Grout?

Objected to as incompetent.

A. My answer is that, they did not.

11 RDQ. After you had stated to Mr. Reynolds your recollection of Mr. Grout's statements to you, did Mr. Reynolds give you an account of the proofs adF. 2175 duced in the equity suits which were in harmony with Mr. Grout's statements to you?

Objected to as irrelevant, immaterial and incompetent.

A. Yes, sir. But I wish to state that my answer to these questions is given with the understanding that the word "recollections" and "statements" used by you in your question, should be qualified as I qualified them in my direct-examination.

12 RDQ. Did Mr. Reynolds tell you after you had stated your recollection that the attending physician of Mr. Fayerweather had deposed in the equity suit that from the night before the day on which this F. 2176 codicil was dated M. Fayerweather was a dying man, and unfit to transact intelligently any business, or that in substance?

Objected to as irrelevant, immaterial and incompetent.

A. Yes sir.

12 RDQ. Did Mr. Reynolds tell you after you had stated your recollection of your interview with Mr. Grout that the codicil dated on Mr. Fayerweather's dying day had given to his Executors Ritch, Bulkley & Vaughan, in form absolutely, for themselves, a residuary estate of about three millions of dollars? And that such disposi-

tion of his estate was in direct violation of the instructions for the codicil which Mr. Vaughan testified, he received from Mr. Fayerweather on the morning of the day of his death?

Objected to as irrelevant, immaterial, incompetent, improper in form.

A. To the first part of the question my answer is that I knew all that beforehand, and that Mr. Reynolds did tell me so. My answer to the second part of the question is, Mr. Reynolds did tell me so.

F. 2177

Mr. Bovee: I move to strike out all of the answer of the witness before the words—"Mr. Reynolds did tell me so" as not responsive to the question and improper and irrelevant.

13 RDQ. Did Mr. Reynolds tell you that Mr. Grout's presence in Mr. Fayerweather's house on the day of Mr. Fayerweather's death as coming from Mr. Ritch's office, was in consistent with evidence in the Equity suit; that Mr. Fayerweather had executed a codicil four days before drawn by Prescott Hall Butler for the purpose of excluding Mr. Ritch from the administration of

F. 2178 Fayerweather's estate, and with the fact that Mr. Mr. Ritch had, four days before been displaced from Mr. Fayerweather's respect and confidence, and had in writing, and in vain appealed to Mr. Fayerweather to see Mr. Ritch and to permit him to explain that Mr. Ritch's intentions towards Mr. Fayerweather and his estate, were honest and honorable, and that Mr. Fayerweather had refused to see him, and inconsistent with the testimony given by Doctor Allen McLane Hamilton in the Equity Suit; that Mr. Fayerweather was not in a condition to have intelligently executed that codicil, and that Mr. Grout's testimony in support of the probate

of the will in which he had denied touching Mr. Fayerweather's hand, was inconsistent with the testimony of the attesting witness, Elizabeth R. Joyce; that Mr. Grout had held Mr. Fayerweather's hand while he signed the codicil, and that Mr. Grout's testimony that Mr. Fayerweather adopted or assented to that codicil by saying Yes, yes, I know—when Mr. Grout was explaining it to Mr. Fayerweather, and that Mr. Fayerweather showed his consciousness of what he was about by saying
F. 2179 after his name was signed "Pshaw, that is a pretty signature for a man to write," was in conflict with the testimony of both the other attesting witnesses who had deposed that Mr. Fayerweather uttered no words on that occasion?

Objected to as irrelevant, immaterial, incompetent; improper in form, assuming facts not testified or proven in this case; and a gross abuse of the rule of the United States Circuit Court under which this examination is taken.

A. He told me that in the second conversation I had with him; not in the first.

F. 2180 14 RDQ. If you recall anything else of what Mr. Reynolds stated to you after you had stated him your recollection of the interview you had with Mr. Grout stated?

Objected to as irrelevant, immaterial and incompetent.

A. He told me that Mr. Grout had talked to other people about the same way that ne had talked to me, according to my report of the conversation. He also told that Mr. Carvalho had testified as to the signature as to the genuineness or as to the character of the signature, and other matters along that same line he told me.

Motion made to strike out the answer of the witness as irrelevant, immaterial and imcompetent.

15 RDQ. When Mr. Reynolds first requested you to testify as a witness, did you at once assent?

Objected to as irrelevant and immaterial.

A. No, sir.

16 RDQ. What statements, arguments or inducements did Mr. Reynolds hold out to you in support of his request to you to testify.

Objected to as improper in form, and as incom-
F.2181 petent.

A. The inducement that brought me to a feeling of readiness to testify in response to a subpœna was the fact that I was made to realize that this same conversation had taken place between others, besides myself, in which Mr. Grout was a party. Until I was so convinced, I felt that the conversation was not my property, and that it was a matter about which I could not testify to except under compulsion. When I so realized I felt that I could testify to the conversation without a violation of confidence. No other inducement operated with me. That is my answer.

Motion made to strike out the answer of the wit-
F. 2182 ness, as not responsive to the question; irrelevant, immaterial and incompetent.

17 RDQ. Question repeated. I did not think it was altogether responsive to the question. What statements, arguments or inducements did Mr. Reynolds hold out to you in support of his request to you to testify?

A. Well he argued along the line of justness.

Same objection to this question, as before.

A. And right, as to the disposition of the estate, the alienation of a man's property; he mentioned the facts bearing on those subjects. But I understood your question to mean, arguments that operated with me.

18 RDQ. No, I refer to Mr. Reynolds' arguments and inducements.

Motion made to strike out the statement of the witness as not responsive to the question; as irrelevant, immaterial and incompetent.

19 RDQ. Mr. Bovee has asked you questions to the effect that Mr. Reynolds introduced the subject to you by giving his version of occurrences, some of them relating to Mr. Fayerweather's conduct, coupled with the idea that Mr. Reynolds had never seen Mr. Fayerweath-
F. 2183 er in his lifetime, and with the suggestion that Mr. Reynolds had induced you to recall and testify to your conversation with Mr. Grout by that course of conduct. I have inquired as to what Mr. Reynolds did say to you as to the testimony already taken in one of these causes, and when he said it. You have testified that you did not at once assent to the request that you testify, but that you finally, for reasons good to you, decided to testify. And now, I wish you to say, what arguments and inducements Mr. Reynolds attempted to use to lead you to that conclusion, irrespective of the relative weight which you gave to one or the other. I want all that Mr. Reynolds said to persuade you to testify, and every
F. 2184 inducement that he held out to you in that connection?

Objected to as irrelevant, immaterial and incompetent; as improper in form, and as having been already answered.

A. I should not have been willing to testify if it had not been for the subpœna.

Motion made to strike out the answer of the witness.

A. I have not answered the question yet. I can not say that I testify even now, willingly.

Motion made to strike out the answer on the grounds stated before.

20 RDQ. Have you stated all that Mr. Reynolds said to you in urging you to testify? If not, please add anything you recall.

Same objection.

A. My answers to your questions, and my own statements, cover everything, but one point. I think Mr. Reynolds spoke of the condition—of the financial condition of Mrs. Fayerweather under the will.
F. 2185 That is the only other circumstance that I can now remember.

Motion made to strike out statement of witness that Mr. Reynolds also spoke of the financial condition of Mrs. Fayerweather, as irrelevant, immaterial and incompetent.

21 RDQ. Were the statements made to you concerning conversations which Mr. Grout had had with other persons made to you before or after you had stated to Mr. Reynolds your recollection of your conversations with Mr. Grout?

Objected to as irrelevant, immaterial and incompetent.

A. After.

F. 2186 22 RDQ. Were your statements to Mr. Reynolds of your recollection of Mr. Grout's statements to you, the same as you have testified to here as the substance of the conversation with Mr. Grout?

Objected to as irrelevant, immaterial and incompetent; and improper in form, and as calling for the conclusion of the witness.

A. Yes.

Adjourned to June 14th, 1901 at 2 p. m.

NEW YORK, June 14th, 1901.

Met pursuant to adjournment. Present: The Examiner, Mr. Blaikie, and representatives of Root, Howard, Winthrop, & Stimson, Nash & Jones, and Ritch, Woodford, Bovee & Wallace.

Adjourned to June 17th, 1901, at 12 m.

F. 2187

New York, June 17, 1901.

Met pursuant to adjournment. Present: The Examiner, Mr. Blaikie and a representative Ritch, Woodford, Bovee & Wallace and Root, Howard, Winthrop & Stimson.

Adjourned to June 21st, 190[illegible], at 10:30 a.m.

F.2188

COMPLAINANTS' PROOFS.

NEW YORK, June 21st, 1901.

Met pursuant to adjournment. Present: The Examiner. Mr. Bovee, Mr. Blaikie, Mr. Niles, and a representative of Nash & Jones.

Adjourned to June 28th, 1901, at 10.30 a.m.

(Signed) ALBION MORRIS DYER.

I, Louis W. Marcus, Surrogate of the County of Erie, in the State of New York, do hereby certify that Albion M. Dyer, the above named subscribing witness, was cautioned and sworn to testify in each of the causes above entitled the whole truth and carefully examined.

That his testimony in chief was reduced to writing by me and by no other person; and that his cross-examination and re-direct-examination were reduced to writing by a typewriter in my presence and under my direction, pursuant to a stipulation made before me as recited in the foregoing deposition; and that after being so reduced to writing this testimony was subscribed in my presence by said Albion M. Dyer, who first, before subscribing, read over the same.

I do further certify that said deposition with the certificate aforesaid of the reason of taking it, had appended to it as the notice given to the adverse parties is by me sealed up and directed to the Clerk of the Circuit Court of the United States for the Southern District of New York.

My fee is One hundred dollars ($100) for taking such deposition, paid by complainants, and is just and reasonable.

In Testimony Whereof I have hereunto subscribed my name and appended my seal of office this 15th day of May, 1901.

(Signed) LOUIS W. MARCUS, Surrogate.

[Seal.] Erie County, N.Y.

State of New York, } ss.

SURROGATE'S COURT: Erie County. }

I, Louis B. Hart, clerk of the Surrogate's Court of the County of Erie, N. Y., do hereby certify that Hon. Louis W. Marcus is the Surrogate of the said County of Erie, duly commissioned and qualified and the sole Judge and Probate manager of the said Surrogate's Court, and that his signature to this certificate is genuine.

In Witness Whereof I have hereunto set my hand and affixed the seal of this Court at the City of Buffalo, N. Y., this 15th day of May in the year of our Lord nineteen hundred and one.

(Signed) LOUIS B. HART,

[Seal.] Clerk Surrogate's Court, Erie County.

TESTIMONY OF ALBION M. DYER.

NEW YORK, June 28th, 1901.

Met pursuant to adjournment. Present: The Examiner, Mr. Blaikie, Mr. Bovee and representatives of Root, Howard, Winthrop & Stimson.

Adjourned to July 3rd, at 10.30 a.m.

F. 2198

NEW YORK, July 3rd, 1901.

Met pursuant to adjournment. Present: The Examiner, Mr. Blaikie, Mr. Bovee's representative and a representative of Root, Howard, Winthrop & Stimson.

Adjourned to July 8th, 1901, at 10.30 a. m.

F. 2190

NEW YORK, July 8th, 1901.

Met pursuant to adjournment. Present: The Examiner, Mr. Blaikie, Mr. Niles and a representative of Mr. Bovee.

Adjourned to July 15th, 1901, at 10.30 a.m.

TESTIMONY OF ALBION M. DYER.

NEW YORK, July 15th, 1901.

Met pursuant to adjournment. Present: The Examiner, Mr. Blaikie, Mr. Bovee's representative, a representative of Root, Howard, Winthrop & Stimson and Mr. MLaughlin.

Adjourned to July 22nd, 1901, at 10.30 a.m.

F. 2191

NEW YORK, July 22nd, 1901.

Met pursuant to adjournment. Present: The Examiner, Mr. Blaikie, Mr. Bovee's representative, and a representative of Root, Howard, Winthrop & Stimson.

Adjourned to July 29th, 1901, at 1.30 p. m.

F. 2192

NEW YORK, July 29th, 1901.

Met pursuant to adjournment. Present: The Examiner, Mr. Blaikie, Mr. Bovee, Mr. Niles, Mr. Bishop, Mr. McLaughlin, a representative of Messrs. Parsons, Shepard & Ogden and Mr. DeForest.

Adjourned to August 1st, 1901, at 1.30 p.m.

NEW YORK, August 1st, 1901.

Met pursuant to adjournment. Present: The Examiner, Mr. Blaikie, Mr. Bovee's representative, and a representative of Messrs. Root, Howard, Winthrop & Stimson.

Adjourned at the request of Mr. Bovee to August 6th, 1901, at 2 p.m.

F. 2193

NEW YORK, August 6th, 1901.

Met pursuant to adjournment. Present: The Examiner, Mr. Bovee, and a representative of Messrs. Root, Howard, Winthrop & Stimson.

Adjourned to August 13th, 1901, at 2:30 p. m.

F. 2194

NEW YORK, August 13th, 1901.

Met pursuant to adjournment. Present: The Examiner, Mr. Blaikie, Mr. Butcher, Mr. Niles and a representative of DeForest Brothers.

Adjourned to August 15th, 1901, at 2 p. m.

NEW YORK, August 15th, 1901.

Met pursuant to adjournment. Present: The Examiner, Mr. Blaikie, Mr. Carnochan, Mr. Niles and Mr. Butcher.

Adjourned to August 22nd, 1901, at 2 p. m.

NEW YORK, August 22nd, 1901.

F. 2195

Met pursuant to adjournment. Present: The Examiner, Mr. Bovee, Mr. Blaikie, Mr. Carnochan and Mr. Niles.

Adjourned to August 28th, 1901, at 2 p. m.

NEW YORK, August 28th, 1901.

F. 2196

Met pursuant to adjournment. Present: Mr. Blaikie, Mr. Carnochan, Mr. Bucher and Mr. Niles.

Adjourned to August 30, 1901, at 2 p. m.

NEW YORK, August 30th, 1901.

Met pursuant to adjournment. Present: The Examiner, Mr. Blaikie, Mr. Carnochan and Mr. Butcher.

Adjourned to September 11, 1901, at 2 p. m.

NEW YORK, September 11, 1901.

Met pursuant to adjournment. Present: The Examiner, Mr. Blaikie, Mr. Carnochan and Mr. Butcher.

Adjourned to September 18th, 1901, at 2 p. m.

F. 2197

NEW YORK, September 18th, 1901.

Met pursuant to adjournment. Present: The Examiner, Mr. Blaikie and Mr. Niles.

Adjourned to September 25th, 1901, at 2 p. m.

NEW YORK, September 25th, 1901.

F. 2198

Met pursuant to Adjournment. Present: The Examiner, Mr. Blaikie and Mr. Butcher.

Adjourned to October 2nd, 1901, at 2. p. m.

NEW YORK, October, 2th, 1901.

Met pursuant to adjournment. Present: The Examiner, Mr. Blaikie, Mr. Niles.

Adjourned to October 9th, at 2 p.m.

TESTIMONY OF T. G. RITCH.

NEW YORK, October 9th, 1901.

Met pursuant to adjournment. Present: The Examiner, Mr. Blaikie and Mr. Bovee.

Adjourned to October 11th, 1901, at 2 p.m.

F. 2199

NEW YORK, October 11th, 1901.

Met pursuant to adjournment. Present: The Examiner, Mr. Blaikie, Mr. Bovee and Mr. Niles.

THOMAS G. RITCH, called as a witness on behalf of the complainants, being duly sworn, testified as follows:

Direct examination by Mr. Blaikie:

F. 2200

1 Q. Mr. Ritch, you have been subpœnaed to bring the will of Mr. Daniel B Fayerweather dated October 22nd, 1880. Have you brought that?

Mr. Bovee: One moment. Counsel for the defendants inquires whether this interrogation is in behalf of the complainants Fayerweather and Achter and the complainant Reynolds in the cross-bill.

Mr. Blaikie: This is in behalf of the complainant Reynolds in the cross-bill.

Mr. Bovee: And not in behalf of the complainants Fayerweather and Achter in the bill?

Mr. Blaikie: I should have to think a moment before I say. Yes, I will make it in behalf of them too.

Mr. Bovee: And does Mr. Blaikie as attorney and counsel for the complainants Fayerweather and Achter make the examination in behalf of those parties?

F. 2201

Mr. Blaikie: I make the examination in behalf of both parties.

Mr. Bovee: Counsel for the defendants in Fayerweather and Achter against Ritch object to it as irrelevant and immaterial to any issue or allegation contained in the bill, and irrelevant and immaterial to any issue raised upon the special pleas. They object in the cross bill on the ground that it is irrelevant and immaterial and incompetent to any issue presented upon the special pleas, and that the United States Circuit Court has no jurisdiction in proceedings to establish a last will and testament of Daniel B. Fayerweather.

F. 2202

(Question repeated by stenographer.)

A. I have not.

2 Q. Will you please to state why?

Mr. Bovee: Same objection.

A. I have not been able to find it.

3 Q. Please to state what search you have made?

Mr. Bovee: Same objection.

A. I have not seen it for several years. Since the subpœna was served I have made personal search in various directions and have had clerks make search wherever it was thought that it possibly might be, and it has not been found.

4 Q. Wherever it was thought by you that it possibly might be?

Mr. Bovee: Same objection.

F. 2203

A. By me or the clerks who had more or less charge of papers.

5 Q. Where did you last see it, Mr. Ritch?

Mr. Bovee: Same objection.

A. I do not recall.

6 Q. When did you last see it?

Mr. Bovee: Same objection.

F. 2204

A. I saw it during the litigation pending in the Surrogate's Court; I may have seen it during the trial before Judge Truax. I have no recollection of seeing it since that time.

7 Q. Who had it during the Surrogate's proceeding?

Mr. Bovee: Same objection.

A. I do not remember.

8 Q. Your office or anyone connected with it?

Mr. Bovee: Same objection.

A. I do not remember.

9 Q. During the trial before Justice Truax do you not recall that it was offered as an exhibit?

Mr. Bovee: Same objection.

A. I do not.

10 Q. Do you know any other place to look for it where there is any likelihood of finding it?

Mr Bovee: Same objection.

F. 2205

A. I did not. As I understand there has been a most thorough search everywhere for various papers.

11 Q When did you yourself have it last?

Mr. Bovee: Same objection.

A. I do not remember having had it in my possession since the Surrogate's litigation.

12 Q. Who drew it?

Mr. Bovee: Same objection.

A. I do not know.

13 Q. Was it not drawn by you or under your direction?

F. 2206 Mr. Bovee: Same objection.

A. The will of 1880?

14 Q. Yes, sir.

A. Not that I recall.

15 Q. Not that you recall?

A. Is not that the Fiero will?

16 Q. I do not know whether Fiero drew it or not—I do not know but what Fiero drew it, come to think of it. It is the 1880 will I know, and October 2nd; but the drawing of it—now that you speak of it I think it was the Fiero will. Then you never had it in your possession, did you?

Mr. Bovee: Same objection.

A. Yes.

17 Q. When?

Mr. Bovee: Same objection.

A. I had it in my possession while I was taking memoranda in drawing the will of 1884.

18 Q. Where did you get it at that time, Mr. Ritch?

Mr. Bovee: Same objection.

F. 2207

A. Mr. Fayerweather had it with him.

19 Q. And did you have it at your office at that time?

Mr. Bovee: Same objection.

A. Yes.

20 Q. And did Mr. Fayerweather leave it your office?

Mr. Bovee: Same objection.

A. He left it at the time.

21 Q. And do you know of its ever having been taken from your office after that?

F. 2208

Mr. Bovee: Same objection.

A. I have no recollection pro or con on the matter.

22 Q. Did you ever see it after that?

Mr. Bovee: Same objection.

A. I think I saw it during the Surrogate's litigation.

23 Q. Where, in the Court-room, the Surrogate's Court-room.

Mr. Bovee: Same objection.

A. I do not remember.

24 Q. In whose hands?

Mr. Bovee: Same objection.

A. I do not remember.

25 Q. Did you ever have it in your hands after the time the memoranda were made on it that you have referred to?

Mr. Bovee: Same objection.

A. I do not remember.

26 Q. Who made those memoranda on it or any of them?

F. 2209

Mr. Bovee: Same objection.

A. I did.

27 Q. Did you make all the memoranda that were on it at the time it was produced ot the trial before Judge Truax?

Mr. Bovee: Same objection.

A. I do not remember.

28 Q. How many memoranda did you make on it?

F. 2210 Mr. Bovee: Same objection.

A. I could not recall.

29 Q. How did you come to make those memoranda on it, Mr. Ritch?

Mr. Bovee: Same objection.

A. The will was before me; Mr. Fayerweather was sitting by me; that will was gone over paragraph by paragraph, and changes suggested by me were penciled on the will.

30 Q. Who penciled them?

Mr. Bovee: Same objection.

A. I did.

31 Q. Yourself?

Mr. Bovee: Same objection.

A. My recollection is that the short suggestions were penciled on the will; longer ones were made on a separate sheet of paper; but I do not remember.

32 Q. Do you know where that sheet of paper is, that separate sheet.

F. 2211

Mr. Bovee: Same objection.

A. No.

33 Q. Were any made on the will other than in pencil?

Mr. Bovee: Same objection.

34 Q. In ink or any other material?

Mr. Bovee: Same objection.

A. I cannot recall.

35 Q. Did anyone make any memorandum on that will that you know of except yourself?

Mr. Bovee: Same objection.

F, 2212 A. I do not remember.

36 Q. Do you remember that they did not?

r.M Bovee: Same objection.

A. I think it very possible that they did.

37 Q. Did you ever see any other handwriting on it than your own?

Mr. Bovee: Same objection.

A. I do not remember.

38 Q. Mr. John R. MacArthur of your office had charge during the trial beforeMr. Justice Truax of some of the exhibits; do you know whether he had charge of this one?

Mr. Bovee: Same objection.

A. I do not.

39 Q. Have you made all the search in every place that you can think there is any possible reason of finding this paper?

Mr. Bover: Same objection.

A. I have either myself or by clerks.

40 Q. Where did you search, Mr. Ritch.

F. 2213

Mr. Bovee: Same objection.

A. In all the office safes where—either I did it or clerks did it—in all the office safes where any Fayerweather papers were kept.

41 Q. Where else?

Mr. Bovee: Same objection.

A. And in all places where there was in my judgment a possibility of this paper being found.

42 Q. Did you look in any docket or other

F. 2214 office book to see if there was any memorandum in regard to this paper?

Mr. Bovee: Same objection.

A. I did not.

43 Q. If such a paper were left with you by a client would it or would it not be entered in any book of your office, would any reference to it I mean be entered there in the natural course of business?

Mr. Bovee: Same objection.

A. Not a paper which, after the bill was executed, had become a memorandum. Ordinarily such papers are destroyed.

44 Q. The last time that you saw it, Mr. Ritch, or at any other time, was the signature of Mr. Daniel B. Fayerweather written upon it?

Mr. Bovee: We object. The paper is the best evidence of what was upon it. We also renew all of the other objections which have been heretofore stated.

A. The signature was upon it, but whether there was an erasure of the signature or not I do not recall.

F. 2215

45 Q. Why did you add the last part of the answer in regard to an erasure when it was not responsive to the question?

Mr. Bovee: We object to the question as improper in form as embodying the assumption of the counsel.

A. To make a clear answer to the question.

46 Q. Did it ever occur to you until today that the signature of Mr. Fayerweather to that paper either was or might have been erased?

Mr. Bovee: Same objection.

A. It is a long time since I have seen it that
F. 2216 I can only say that I presume it was erased.

47 Q. Did he instruct you to erase it?

Mr. Bovee: Same objection.

A. I do not remember.

48 Q. Did you ever erase it?

Mr. Bovee: Same objection.

A. I do not remember.

49 Q. Your memory is fairly good, is it?

A. Very good.

50 Q. Very good.

A. Yes.

51. Did he instruct you to destroy that will when he made the other or at any other time?

Mr. Bovee: Same objection.

A. He did not tell me to destroy it or it would F. 2217 have been done.

52 Q. What did he tell you to do about it, if anything?

Mr. Bovee: Same objection.

A. I do not remember.

53 Q. Was there any erasure of his signature in whole or in part on that will at the time it was produced in the trial before Justice Truax?

Mr. Bovee: Same objection.

A. I do not remember.

54 Q. Are you positive that you never had that F. 2218 paper in your possession or under you control since the trial before Justice Truax early in the year 1884?

Mr. Bovee: Same objection.

A. The trial was long since 1884.

55 Q. 1894 I beg your pardon, Mr. Ritch. Are you positive?

Mr. Bovee: Same objection.

A. I am quite positive I have not seen it since 1894.

56 Q. Will you state any impression, if you have any, of what became of it at or after the Truax trial?

Mr. Bovee: Same objection.

A. No other impression than that like other papers it has been mislaid.

57 Q. Did you never write to anyone speaking of that will and stating its existence after Mr. Fayerweather died?

Mr. Bovee: Same objection.

A. I do not recall.

58 Q. Didn't you state that you had it after Mr. Fayerweather died in a letter to anyone?

F. 2219

Mr. Bovee: That is objected to as incompetent. If there is any such letter in existence the letter is the best evidence. It is objected to also as irrelevant and immaterial to the issues presented upon the special pleas, and on the further ground that the Federal Court has no jurisdiction to establish a will of real or personal property.

A. At some time and to some one I have an impression that I wrote a letter stating that a will prior to the will of 1884 was in existence—that the will was in existence.

59 Q. Who was that someone?

F. 2220 Mr. Bovee: Same objection.

A. I can only say that I think it was one of three persons, Mr. Bulkley, Mr. Vaughan or Judge Beardsley.

60 Q. Which of the three do you think it was?

Mr. Bovee: Same objection.

A. If I wrote to anyone about wills I should think it would be Judge Beardsley, but I do not recall it.

61 Q. Did you not say in a letter to Judge Beardsley

in the month of December, 1890, that that will was in your possession?

Mr. Bovee: Same objection.

A. I have the impression that I wrote him stating that a will prior to 1884 was in existence or had been in existence.

62 Q. Did you never have it in your possession after you drew the will of October 6th, 1884, that
F. 2221 you now know of?

Mr. Bovee: Same objection.

A. I do not recall.

63 Q. Have you, since December, 1890, either orally, by writing or otherwise, ever conferred with Judge Beardsley or ex-Judge Beardsley about that will?

Mr. Bovee; Same objection.

A. I think not.

65 Q. Within two weeks have you conferred
F. 2222 with him regarding the Fayerweather litigation or anyone connected with it?

Mr. Bovee: Same objection.

A. I have not.

65 Q. Not in any way?

Mr. Bovee: Same objection.

A. No, sir.

65 Q. Neither in writing nor in conversation, being together, or over the telephone, or in any other way?

Mr. Bovee: Same objection.

A. I have not.

67 Q. Did you ever have any will in any other place than in your office except at the hearing before Justice Truax, or did you ever see it in any other place than at one of those two places, your office or the Truax court-room, and if so, where?

Mr. Bovee: Same objection.

A. I do not remember seeing it. The Surro-
F. 2223 gate's Court, probably.

68 Q. That was the only other place?

Mr. Bovee: Same objection.

A. All that I recall.

69 Q. Do you remember whether you ever saw it at Mr. Fayerweather's house?

Mr. Bovee: Same objection.

A. I have no recollection of seeing it there.

Mr. Blaikie: I think that is all with Mr. Ritch.

Adjourned to October 18th, 1901, at 2 p.m.

F. 2224

NEW YORK, October 18th, 1901.

Met pursuant to adjournment. Present: The Examiner, Mr. Blaikie, Mr. Bovee and Mr. Niles.

Adjourned to October 23rd, 1901, at 2:30 P. M.

TESTIMONY OF CALEB B. KNEVALS.

NEW YORK, October 23rd, 1901.

Met pursuant to adjournment. Present: The Examiner, Mr. Blaikie, Mr Bovee and Mr. Niles.

F. 2225

COMPLAINANTS' PROOF.

CALEB B. KNEVALS, called as a witness, being duly sworn testified as follows:

Direct examination by Mr. Blaikie:

1 Q. What is your name?
A. Caleb B. Knevals.

F. 2226 Mr Bovee: Defendants object to any examination of this witness upon the ground that the complainants in the bill and in the cross bill have heretofore announced and declared the taking of their testimony was closed.

Mr. Blaikie: Counsel for the complainants both in the bill and cross bill state that such time has been duly extended by order of the court.

2 Q. In the year 1890 what was your occupation?
A. I was comptroller of Woodlawn Cemetery.
3 Q. How long had you been then?
A. I had been comptroller for about ten years.

4 Q. How long did you remain so thereafter?

A. Until 1899—the middle.

5 Q. And what were your duties in that position so far as the cemetery itself went?.

A. Well, I went with the superintendent.

Mr. Bovee: We object it as irrelevant and immaterial to the issues presented upon the special pleas, and incompetent.

F. 2227 The witness; I went with the superintendent in his carriage around the grounds to see that the grounds were kept in order and that the different monuments and lots and tombs were in good condition.

6 Q. How often would you so go?

A. About twice a week.

7 Q. And you kept that up how long?

A. Always.

8 Q. So long as you held the position?

A. During my comptrollership.

9 Q. Did you know of the tomb of Daniel B. Fayerweather there?

A. I did.

10 Q. Did you know of it at the time of his
F. 2228 death and burial?

A. I did.

11 Q. And did you observe its condition?

A. I have repeatedly.

12 Q. Repeatedly, you say?

A. Yes.

13 Q. Please state what that condition was when you last observed it; when did you last observe it?

A. I observed it last two years ago, just before I gave up.

14 Q. State its condition then?

A. Its condition then, in 1899, was very bad; when I last saw it it was disintegrating very rapidly owing to the action of the weather.

15 Q. You mean by that what was disintegrating; please state in detail?

Mr. Bovee: Same objection; and I move to strike out the statement of the witness that its condition is very bad, as giving a conclusion, and that it is disintegrating rapidly as giving a conclusion and not a fact.

A. I noticed year by year that it was growing worse, and naturally, as comptroller of the cem-
F. 2229 etery, looked to those things; the whole reputation of the cemetery is involved in the condition of its monuments and tombs.

Mr. Bovee: I wish you would answer the question and not volunteer any testimony.

The Witness: I do not know where to draw the line.

16 Q. Did you ever speak to any of the executors of Mr. Fayerweather about this tomb?

Mr. Bovee: Objected to as irrelevant and immaterial to the issues presented upon the special pleas,
F. 2230 and as incompetent.

A. I did.

17 Q Which one or more of them did you speak to?

A. Mr. Thomas G. Ritch.

18 Q. And what did you say to him?

A. I told him of the condition of the tomb as I then saw it, and represented to him that it would naturally grow worse season after season.

19 Q. When was that?

A. Well, I should say it was in 1897.

20 Q. What did you tell him was its condition then?

A. Bad.

21 Q. In what respect or respects?

A. The seams in the roof—

Mr. Bovee: Objected to as irrelevant and immater to the issues presented on the special pleas, and as competent.

The Witness: —were separating and let the snow a rains through, and molding and discoloring the inter lining of marble and mosaic; and around the w

F. 2231 dows moisture and dampness was very perce ible.

22 Q What kind of a tomb is it?

Mr, Bovee: Same objection,

A. It is a granite tomb.

23 Q. What size?

A. It is what is called pink granite, and it i tomb perhaps 20 feet square.

24 Q. And how high?

A, 12 or 15 feet.

25 Q. And the disintegration that you have spoken where did that take place?

F. 2232.

Mr. Bovee: Objected to as irrelevant and immater to the issue presented on the special pleas, and inco petent.

A. In the roof, the seams of the roof.

26 Q. That was on the outside only or on the insi also?

A. It showed itself inside.

27 Q. Would the water work into the inside of t tomb?.

A. And around the windows also and disclosed t lining, the marble flooring and the mosaic sides and ce ing all was very much discolored and moldy.

28 Q. What was the effect, if any, on the seams between the stones?

A. Well, they gradually became wider and wider apart; there was a difference there in a few years.

29 Q. Would more water and snow go in in the earlier or later years?

Mr. Bovee: Objected to as irrelevant and immaterial to the issues presented on the special pleas, and as incompetent.

F. 2233 A. It increased year by year, bad conditions continued to exist.

30 Q. Was that tomb all ready and completed at the time of his death?

A. No, not quite; within about six months it was finished; six months later.

31 Q. And it took some six months after his death before it was completed?

A. Yes.

32 Q. Under whose supervision was it completed?

Mr. Bovee: Objected to as irrelevant and immaterial to the issues presented on the special pleas, and as incompetent.

A. The executors.

F. 2234 33 Q. And how was it completed, well or ill?

Mr. Bovee: Objected to as irrelevant and immaterial to the issues presented on the special pleas; and as incompetent.

A. Well, I saw no difference, before or after his decease, as to the method, manner or mode of construction at all.

Mr. Bovee: I move to strike out the answer as not responsive to the question.

34 Q. How was it, was it well or ill constructed?

Mr. Bovee: Objected to as irrelevant and immaterial to the issues presented upon the special pleas, and as incompetent and calling for a conclusion.

A. I have said repeatedly it was very badly constructed.

35 Q. And would the work of disintegation reach into the portion of the tomb where the casket in which Mr. Fayerweather was buried, was?

F. 2235 Mr. Bovee: Same objection.

A. Of course I have no means of knowing; I never opened the catacombs at all, but the presumption is that if it leaked there it leaked all over.

36. Q. What do you mean by catacombs?

A. The catacombs where the bodies lay. I don't know that any water got into those catacombs, for I never looked in.

37 Q. How soon after its completion, Mr. Knevals, did you discover these imperfections showing themselves?

Mr. Bovee: Same objection.

A. Well, within a year afterwards.

F. 2236 38 Q. What did you do when you found that out?

Mr. Bovee: MSame objection.

A. We continued to inspect it and after a while I went to see Mr. Ritch, whom I knew personally.

39 Q. And was anything done to correct its condition?

A. Not that I know of; I never saw any appearance of anything at all in the way of repairs.

40 Q. Had there been, would you have seen it?

Mr. Bovee: Objected to as irrelevant and immaterial to the issues presented upon the special pleas, and as incompetent.

A. Oh, I no doubt would, as I was around there twice a week.

41 Q. You were around there twice a week?

A. Yes, and it couldn't be done without my knowing it.

Cross-examination by Mr. Bovee:

42 xQ. Is Mrs. Fayerweather interred in that tomb?

A. She was.

F. 2237 43 xQ. Is her body still there, so far as you know?

A. As far as I know, it is.

44 xQ. Do you know who is the executor of her estate?

A. Mr. Reynolds is one, I believe.

45 xQ. Mr. John B. Reynolds?

A. Yes.

46 xQ. Were you requested to come here by Mr. John B. Reynolds to give the testimony that you have given?

A. Yes.

47 xQ. Brought here by him, Mr. Knevals?

A. I wasn't brought here; I am an invalid; I F. 2238 have a very bad foot and I rode down.

48 xQ. He came with you?

A. Yes, he came with me.

49 xQ. When did Mr. Reynolds first request you to come here and testify?

A. Well, it was last Friday evening.

50 xQ How many times have you spoken to him on this subject since last Friday evening?

A. Not at all since then.

51 Q. Was that the first time that he had spoken to you about testifying?

A, I think I came here two years ago in this very

room, and when I got here I was informed that I was not wanted.

82 xQ. Had you come on that occasion two years ago at the solicitation of Mr. Reynolds also?

A. Yes.

53 xQ And have you ever made any complaint to Mr. John B. Reynolds of the condition of this tomb?

A. I have talked with him about it, and told him that I thought it was simply disgraceful.

54 xQ. Did you ever make any request of him F. 2239 to see that that tomb was put in order?

A. I cannot say that I did or did not.

55 xQ. You have always known that he was executor of Mrs. Fayerweather's estate, have you not?

A. Yes; and whether in my conversation I presented a formal request that he have it made over, I do not know; I should think not, because it was Mr. Fayerweather's tomb.

56 xQ. But she was interred there?

A. Yes.

57 xQ. When did you last see this tomb, Mr. Knevals?

A. I should think it was about two years ago; since then I have been very ill.

58 xQ. And what the present condition of that F. 2240 tomb is you do not know?

A. I do not know what it is to-day; I have not seen it since two years ago.

59 xQ. Of your knowledge you do not know what has been the condition of the tomb for the two years last past since you saw it last?

A. No.

60 xQ. Did you ever know Mr. John B. Reynolds to do any work or have any work done on his own account, or as executor of Lucy Fayerweather, upon that tomb?

A. I did not.

61 xQ. Mr. Reynolds has been familiar with the condition of this tomb, has he?

A. I do not know; you will have to ask him; I am sure he has been for two or three years.

62 xQ. You have seen him there, have you not, at the tomb?

A. I do not know that I ever did.

63 xQ. But it is your understanding that he has been kept advised and familiar with the condition?

A. Yes.

64 xQ. If any work had been done upon that tomb through the instrumentality of Mr. John B.
F. 2241 Reynolds, you would have known of it?

A. Yes, I would have known of it.

65 xQ. And you never have known of any such?

A. No.

66 xQ. The John B. Reynolds that you have been speaking of is the gentleman who is the sole acting executor of the will of Mrs. Fayerweather, and the husband of her sister, Mrs. Reynolds, formerly Anner Amelia Joyce?

A. Yes.

67 xQ. When did you have this conversation with Mr. Ritch that you speak of, Mr. Knevals?

A. Well, I cannot remember, but I should think it was about in 1897—1896 or 1897.

F. 2242 68 xQ. Where was it you saw him?

A. At his office.

69 xQ. Where was that?

A. 18 Wall street—in Wall street.

70 xQ. In 1897?

A. Yes.

71 xQ. You are confident of that, are you?

A. No. I am not confident at all; I think it was about that time.

72 xQ. Are you confident that you saw him in 18 Wall street, whenever it was you saw him?

A. Well, I do not know the number in Wall street; it is where the present offices are now of Arnoux, Ritch &

Woodford; in those offices I saw him, I should think it was 1897.

73 xQ. Did anybody go with you there?

A. No.

74 xQ. Was anybody with Mr. Ritch when you had the conversation?

A. No, I think not.

75 xQ. How long did the conversation last?

A. Oh, I should think fifteen minutes.

76 xQ. What did Mr. Ritch say when you told
F. 2243 him the condition?

A. Well, I am not able to reproduce his words at all, what he said, but I think he manifested some little surprise.

77 xQ. Didn't he say to you that at that time the estate of Daniel B. Fayerweather was involved in litigation by Mr. Reynolds and two of the heirs of Mr. Fayerweather?

A. I do not know that he said it; I do not know that he did.

78 xQ. Didn't you understand that was the fact at that time?

A. I did understand generally that was the fact.

79 xQ. And that in this litigation Mr. Reyn-
F. 2244 olds and the two nieces of Mr. Fayerweather, western nieces, were seeking to tie up the estate in this litigation?

A. I do not know anything about that.

80 xQ. But you did understand there was litigation?

A. Well, in the newspapers generally; it was not perfectly understood.

81 xQ. Mr. Knevals, will you swear that Mr. Ritch did not tell you?

A. No, I will not swear that he did not tell me.

82 xQ. He may have told you so and it slipped your memory at this time?

A. Yes.

83 xQ. It is impossible for you, Mr. Knevals, I assume, to tell us what at the present time, in your opinion is essential to be done to put the tomb of Mr. Fayerweather in proper condition?

A. I have my own ideas about it very clear.

84 xQ. But you haven't seen the tomb for two years?

A. I haven't seen it, but I know it is the same old tomb.

85 xQ. Do you?

A. Yes, sir; I am satisfied of that.

F. 2245 86 xQ. Have you been in the cemetery the last two years? A. No, sir.

87 xQ. Have you any information in respect to the condition of that tomb other than what has been conveyed to you by Mr. John B. Reynolds, as a matter of fact?

A. Why do you ask me such a question as that, I just told you I was in the habit of going over the grounds with the superintendent twice a week all during my incumbency there, and I saw it and understood it, and I know when a tomb is well made and badly made.

88 xQ. But it doesn't necessarily follow because a tomb was in disorder in 1899 that it is in the same condition in 1901, does it?

A. Oh, no, it might have been fixed in that

F. 2246 time, possibly. Didn't you ask me what I thought ought to be done to that to put it in order?

89 xQ No, sir, I did not. I asked you if you considered you had sufficiently exact and real knowledge of the actual condition of that tomb at the present time to tell me what it was that you considered necessary to be done. You haven't that knowledge, have you?

A. No, sir.

Mr. Bovee: That is all.

Re-direct Examination by Mr. Blaikie:

90 RDQ. What ought to have been done, in your

judgment, to that tomb when you last saw it, to put it in good order?

Mr. Bovee: I object to it as irrelevant and immaterial to the issues presented upon the special pleas, as incompetent and calling for the opinion of the witness, and hypothetical.

91 RDQ. When you last saw that tomb what in your judgment ought to have been done to it to put it in good order?

A. I do not think anything would cure that and make a proper resting place for Mr. Fayerweath-
F. 2247 er except to take it down from the foundation and build a new one; it was so bad.

92 RDQ. Why did you go to Mr. Ritch's office on the occasion you have described?

Mr. Bovee: Objected to as immaterial and irrelevant to the issues presented upon the special pleas, and as incompetent.

A. Because as comptroller of the cemetery in the interests of the cemetery I went there to see Mr. Ritch to get him if possible to have it built over again.

93 RDQ. Do you know when Mr. Fayerweather died?

F. 2248 A. Well, November, 1890, I think it was.

94 RDQ. Was he immediately buried in the tomb, or where?

A. No, he was placed in the receiving tomb.

95 RDQ. And when was he put in this tomb?

A. When it was finished; in the spring of 1891.

96 RDQ. About what month, if you know?

A. I should think along about May.

97 RDQ. Was any record of that put in there at the time?

A. Yes.

98 RDQ. Where was that record kept?

A. In the receiving tomb record of the cemetery at the city office and also at the other office.

99 RDQ. It was kept in duplicate?

A. It was kept in duplicate at each place.

100 RDQ. And the record there kept of that is correct, is it?

A. Yes, sir, it is supposed to be.

101 RDQ. And who had control of that property so far as your cemetery company was advised; who had control of that property from the death and on
F. 2249 ever since, if you know?

Mr. Bovee: Objected to as immaterial and irrelevant to the issues presented upon the special pleas, as incompetent, calling for the opinion and conclusion of the witness, and the documents which fix the status and rights of the parties are the best evidence; and that the opinion of the gentleman, however familiar he may be, cannot determine the question of law.

102 RDQ. Who had the control of it upon his death and on ever since?

A. As to the finishing?

103 RDQ. And on ever since, as long as you
F. 2250 know of it, since 1890?

Mr. Bovee: Same objection.

104 RDQ. Who had control or did any ordering in there?

A. The control in all such cases falls upon the executor of the estate.

105 RDQ. Of the deceased man whose tomb it was?

A. Yes. You say in your question "that property".

106 RDQ. I meant the lot and the tomb.

A. Yes, the lot and the tomb.

107 RDQ. And had you any information in any way that it belonged to the widow of the deceased or his executor, or anybody in any way connected with them?

Mr. Bovee: Same objection.

A. No, I did not.

108 RDQ. Do you recall how many compartments there are in that mausoleum or tomb in each of which a casket can be laid?

F. 2251 A. I think there are three catacombs.

Mr. Blaikie: That is all.

Re-cross Examination by Mr. Bovee:

109 RXQ. Mr. Knevals, you do not mean to say that the control of a man's tomb is in his executors for all time, do you?

A. I did not say for all time.

CALEB B. KNEVALS.

Sworn before me Oct. 15th, 1901.

JOHN A. SHIELDS,

F. 2252 *Examiner.*

Adjourned to Monday, October 28th, 1901, at 2 p.m.

COMPLAINANTS' PROOF.

NEW YORK, October 28th, 1901.

Met pursuant to adjournment. Present: The Examiner, Mr. Parsons, Mr. Bovee, Mr. Blaikie, Mr. Niles and Mr. Carnochan.

TESTIMONY OF JOSHUA M. FIERO.

JOSHUA M. FIERO, called as a witness on behalf of the complainants, being duly sworn, testified as follows:

Direct Examination by Mr. Blaikie:

Q. What is your business?
A. Attorney and counsellor at law.
F. 2253 2 Q. Are you in active practice?
A. Yes.
3 Q. How many years?
A. Over twenty years.
4. Where?
A. City of New York.
5 Q. Did you know the late Daniel B. Fayerweather, of this city.
A. Yes, sir.
6 Q. How long did you know him?
A. I knew him from about 1868, I guess over 30 years.
7 Q. Did you ever have any business with him?
A. Yes, sir.
F. 2254 8 Q. State what it was?

Mr. Bovee: Defendants object on the ground that it is irrelevant and immaterial to the issues presented by the special plea; as incompetent, involving confidential communications of a professional character between the witness and the deceased.

A. I acted for him as attorney and counsel in various matters with which he was connected.
9 Q. In the year 1878 did you do any business for him or with him?
A. Both.

10 Q. What was it?

Mr. Bovee: Defendants object on the ground that it is irrelevant and immaterial to the issues presented upon the special plea; incompetent, involving professional relations between the witness and the deceased.

A. Among other things I prepared a will.

11 Q. Did he execute that will?

A. He did.

F. 2255 12 Q. Did you see him?

Mr. Bovee: One moment, Mr. Blaikie. Defendants object on the ground that it is irrelevant and immaterial to the issues presented upon the special plea; as incompetent, calling for the conclusion of the witness and his opinion, involving professional relations between the witness and the deceased.

Mr. Blaikie: Do you object to using the words, "Same objection," Mr. Bovee, instead of repeating the objection verbatim—to save my making a motion to strike it out afterwards?

F. 2256

Mr. Bovee: I have no objection to using the words "Same objection" where the objection is the same.

A. I did.

13 Q. Where was this?

Mr. Bovee: Same objection.

A. This will of 1878 was executed in my office at 145 Broadway, in the City of New York.

Mr. Bovee: I move to strike out the answer of the witness as being testimony as to a conclusion of law; the

instrument itself is the best evidence as to whether or not such paper was executed by Daniel B. Fayerweather.

14 Q. Do you know where that will is?

A. I do.

15 Q. Can you produce it?

A. I can.

16 Q. Will you?

A. I will.

17 Q. (Showing paper.) Is this it?

F. 2257 A. It is.

Mr. Bovee: I made the same objection to the last question and answer.

Mr. Blaikie: I now offer this will for identification, and ask to have it marked for identification as complainants' exhibit, and I will ask the Examiner to allow a copy of it to be spread upon the minutes and I will ask the stenographer to make such copy.

Mr. Bovee: Defendants object upon the ground that it is irrelevant and immaterial to the issues presented upon the special plea. Neither upon the bill nor the cross-bill is there any reference made to any will of 1878, that as to a cross-bill filed by the witness such cross-bill is not at issue. I object to the spreading upon the record in this case of a paper which is simply marked for identification.

F. 2258

The paper was marked Complainants' Exhibit No. 1 for identification, October 28th, 1901, W. B.

18 Q. I will ask you, sir, if you allow it to be deposited with the Examiner until we have such a copy made. Will you agree to that?

Mr. Bovee: Whatever request counsel may have of

the witness for his inconvenience has nothing to do with this case. This is not for the record.

Mr. Blaikie: I will ask you to take it down upon the record.

Mr. Bovee: We object to having it on the record.

Mr. Blaikie: Take his objection upon the record.

A. Yes.

Complainants' Exhibit No. 1 for identification of October 28th, 1901 is as follows:

F. 2259

(See Appendix of Exhibits No. 63, pages 302 to 308.)

19 Q. Did you see Mr. Fayerweather execute this will, Mr. Fiero?

Mr. Bovee: I object on the ground that it is irrelevant and immaterial to the issues presented upon the special plea, and calling for a conclusion of the witness, as incompetent, involving a professional communication between the witness and the deceased.

A. Yes, I did.

20 Q. And did you see the witnesses sign the attestation clause?

F. 2260

Mr. Bovee: Defendants object to that on the ground that it is irrelevant and immaterial to the issues presented upon the special plea and not the proper way to prove the execution of a testamentary paper, and calling for the opinion and conclusion of the witness.

A. Yes.

21 Q. Do you know the names of those witnesses now without looking at the will?

A. Yes, sir.

22 Q. What are they?

Mr. Bovee: Same objection.

A. Frank W. Eldredge and Thomas W. Payton.

23 Q. Are they both alive?

A. Yes, sir.

24 Q. You saw those two sign that attestation clause, did you?

Mr. Bovee: Same objection.

A. I did.

25 Q. How did they come to do it?

F. 2261 Mr. Bovee: Same objection.

A. Mr. Peyton was my clerk, and he copied that instrument from my original draft. He was a clerk in my office at the time the instrument was executed and witnessed it at the request of Mr. Fayerweather. Mr. Eldredge was a client of mine who was in the office at the time. He was also requested by Mr. Fayerweather to act as an attesting witness.

26 Q. In whose handwriting, sir, is this will, other than the signatures of these gentlemen?

Mr. Bovee: Same objection.

A. The body of the instrument is in the handwriting of Mr. Thomas W. Peyton.

F .2262 27 Q. This subscribing witness?

A. Yes sir.

28 Q. Did Mr. Fayerweather make any other statement or declaration in your hearing at the time he signed this paper?

Mr. Bovee: Objected to as irrelevant and immaterial to the issues presented upon the special plea, and as incompetent, involving a professional communication between the witness and the deceased and involving a disclosure of information acquired by the witness in his professional capacity as attorney.

29 Q. Did he or did he not make any other declaration or statement at that time?

A. Yes.

30 Q. What did he say?

Mr. Bovee: Same objection.

A. He said that it was his last will and testament and requested those gentlemen to sign as witnesses.

Mr. Blaikie: Defendants may cross-examine.

Mr. Bovee: Defendants cross-examine this witness under protest, insisting that the entire testimony of the witness is irrelevant and immaterial to the issues presented upon the special plea, which raises the
F. 2263 question of the conclusiveness of the judgment in Amherst vs. Ritch; they only cross-examine in order that it may not appear that they have acquiesced in the testimony which in the judgment of counsel for the defendants is irrelevant and immaterial, and in cross-examining the witness they do not waive their objection that the testimony is irrelevant to the issues presented upon the special plea.

Cross-examination by Mr. Bovee:

31 xQ. You were at one time connected with the office of Arnoux, Ritch & Woodford, were you not? A. Yes, sir.

32 xQ. When did you sever your connection with that office?

F. 2264 A. I do not remember precisely the year, but I think it was about 1876 or 1877.

33 xQ. Weren't you there in 1879? A. No, sir.

34 xQ. Or 1878? A. No, sir.

35 xQ. How long had you been in that office prior to the time that you severed your connection in 1876?

A. I had been there three or four years.

36 xQ. Did you know Mr. Fayerweather in that period? A. Yes.

37 xQ. Was he a client of the office at that time?

A. I think he was in 1875 a client of the office.

38 xQ. Were you in the employ of that firm in 1875?

A. Yes.

39 xQ. Did you have to do with some of the business

of Mr. Fayerweather in that office at that time? A. Yes.

40 xQ. You had charge, did you not, Mr. Fiero, of what is known as the general service department of that office? A. Yes.

41 xQ That related to the drawing of wills and testamentary papers, did it not?

A. It did, among other things, yes.

42 xQ Are you the complainant in a cross-bill which has been filed in this court in this litigation?

F. 2265

A. I do not know whether it is in this litigation, I have been brought in as a defendant in some action in which I have filed a cross-bill.

43 xQ. You say you have been brought in?

A. I do not know whether this is the action.

44 xQ. You say you have been brought in. Were you ever served with a subpœna? A. Yes.

45 xQ. When?

A. I cannot tell you the precise date. I know I was served and brought in as a party.

46 xQ. Well, it was very recently you were served, was it not?

A. No, not very recently. I do not remember the date. I am not able to give you the date. I know I was served and I know that my solicitor has put in a plea.

F. 2266

47 xQ. Is that plea the cross-bill which you have filed here? A. Yes.

48 xQ. When was that cross-bill filed?

A. That I could not say.

49 xQ Well, it is within—

A. Certainly, within a few months.

50 xQ. Is it not a fact that it was within a few days?

A, That I do not know, whether it is within a few days.

51 xQ. Do you remember when you verified that bill?

A. No, I think it was—I do not know; I think you better turn to the instrument itself to see the precise date. I think it was probably some time in September.

52 xQ. That is your recellection?

A. That is my recollection about it.

53 xQ. Now, how long prior to the time that you filed that cross-bill was it that you had been served with a subpœna? A. I could not say.

54 xQ. Do you know of any extension of time which had been made to you which—

F. 2267

A. Yes, there were several extensions. There was a large number of extensions.

55 xQ. Was there a general extension holding your time open in which to plead!

A. Well, there were several extensions I remember getting first from one rule day to another rule day; I do not remember how many there were. I left that matter entirely with Mr. Sherman and my brother. My brother I think filed an appearance originally as my solicitor at the time I was brought in as a party and he afterwards I think gave a consent to substitute Mr. Sherman in his place.

F. 2268

56 xQ. When was this substitution given to Mr. Sherman?

A. Well, that was some time either in the Summer or in the early part of September.

57 xQ. Or this year?

A. Yes, I think so.

58 xQ. Was it before or after the substitution of Mr. Blaikie as attorney for the complainant in that litigation?

A. That I could not say.

59 xQ. Do you know Mr John B. Reynolds?

A. Yes, sir.

60 xQ. When did you first meet him?

A. I have known Mr. Reynolds several years. I do not remember the precise date when I first made his acquaintance.

61 xQ. What is your best recollection as to when you first met John B. Reynolds?

A. My recollection would be that it was something like five years ago, possibly more.

F. 2269

62 XQ. Did you then make his acquaintance?

A. I think he came to see me.

63 xQ. Where?

A. I think he came to see me at my office at 11 Wall street.

64 xQ. Did you have an interview with him at that time?

A. Yes.

65 xQ, Was the subject of Mr. Fayerweather's testamentary papers discussed between you and him then?

A. No, I do not know that it was at that time.

66 xQ. Did you tell Mr. John B. Reynolds at that time of this instrument which you have produced here to-day?

F. 2270

A. I think not. I think the discussion was with reference to the will of 1880, if any will was mentioned.

67 xQ. Did you tell him in that interview of a will which you now refer to of 1880?

A. I think he said something in reference to that, that there was such a will in your office of 1880 in which I was named as an executor. I think he had information to that effect.

68 xQ. You knew that will—so-called will of 1880?

A. Oh, yes.

69 xQ. Now, you say this was five years ago, Mr. Fiero?

A. Well, I won't be positive about the precise time. I would think it was certainly as long ago as that.

70 xQ. Do you know what time of the year it was?

A. No.

71 xQ. Whether summer or fall?

A. No.

72 xQ. Did Mr. Reynolds in that interview that you had with him then in a general way apprise you of the status of the Fayerweather litigation?

F. 2271

Mr. Blaikie: Objected to as not cross-examination, and as irrelevant and immaterial.

A. No, I don't think that interview went so far. I don't think he did. I don't remember it.

73 xQ. In that interview, in addition to telling Mr. Reynolds of the will of 1880.

A. Well, I do not know that I told him of it. I stated that if any will was mentioned at all the conversation had reference to the will of 1880. I do not mean to say that even that was discussed in that conversation. I do not recollect. I do not remember it.

F. 2272

74 xQ. But it is your impression that Mr. Reynolds did refer to a will of 1880 and say that such a will was in the office of Arnoux, Ritch & Woodford. That is your recollection, is it not?

A. Yes, I think that perhaps there was something of that said, but I could not state positively.

75 xQ. Now, when Mr. Reynolds made such statement, if he did, did you tell him that there was this other will prior to that that Mr. Fayerweather had executed as to which you have testified today?

A. No, I don't—my impression is with regard to that conversation that we didn't discuss either of these

wills or any of them. What he wanted to inquire from me more particularly was, I think, as to what I knew about Mr. Fayerweather; my acquaintance with him, and what he had said with reference to his wishes in reference to the disposition of his property. My impression is that we didn't talk about these wills, either the 1884 or the 1880 or the other. It may have been that I told, and I probably did in that conversation, that there had been several wills that I had drawn. I had the impression then that I had probably drawn three or four

F. 2273

wills for Mr. Fayerweather. I probably told him I had drawn three or four; I do not think I referred, however, to any particular wills, as to any particular dates. My impression is that what Mr. Reynolds wanted to see me about was more to get me to say what I knew in respect to Mr. Fayerweather's expressions as to what he wanted to do with his property.

76 xQ. When did you next have a conversation with Mr. Reynolds with respect to either of these wills?

A. Oh, I think he probably saw me several times in 18 Wall street or at 11 Wall street, I could not fix the dates. I never charged my mind with it.

F. 2274

77 xQ. Where were you in the early part of the year 1891?

A. 1891?

78 xQ. January, 1891, and February.

A. Well, my office was at either 11 or 18 Wall street.

79 xQ. Were you here in the City practicing your profession?

A. Yes, sir.

80 xQ. Living in the city at that time?

A. Part of the year and part of the year at Mamaroneck.

81 xQ. In a general way you knew of the contest in the Surrogate's Court over the will and codicils of Mr. Fayerweather, did you not?

A. To tell you frankly, I did not follow it at all.

82 xQ. Well, you knew there was such a contest?

A. Oh, yes.

F. 2275

83 xQ. And you knew that the contest was over the the validity of of the will of 1884 and the subsequent codicils, did you not?

A. Well, I use knolwedge in the sense of having seen it in the newspapers yes.

84 xQ. Will you say that you were not present during some of the hearings in the Surrogates' Court over the will—in the contest over the will of 1884 and the subsequent codicils?

A. No, I will not say that I was not.

85 xQ. Were you present during the trial of the case or Amherst College and others against Rich in the Supreme Court before Judge Truax?

F. 2276

A. No, sir.

86 xQ. You knew of the pendency of that litigation, did you not?

A. Only by newspaper report.

87 xQ. You are a graduate of Yale College, are you not, Mr. Fiero?

A. Yes, sir.

88 xQ. You have read the decision of the Court of Appeals in the case of Amherst vs. Ritch, have you not?

A. No, sir.

89 xQ. Never looked it over?

A. No, I think I read the sylabus when I was looking up something else. I think I read the sylabus of it. I did not read the opinion.

90 xQ. When was that, Mr. Fiero?

Mr. Blaikie: I will note the same objection as I made before.

A. I do not remember.

F. 2277

91 xQ. At the time of the contest in the Surrogates' Court did you still have in your possession this will of 1868 which you have produced here to-day?

A. This paper (indicating)?

92 xQ. Yes-

A. Undoubtedly.

93 xQ. Did you ever file or propound that will as a will and testament of Daniel B. Fayerweather in the Surrogates' Office of the City and County of New York?

A. No.

94 xQ. Until you entered the Fayerweather litigation by filing the cross-bill in this action you have made no efforts since his death to secure the probate of this instrument at his last will and testament, have you?

F. 2278

A. No.

95 xQ. The paper has been continuously in your possession since?

A. Yes, I think it has.

96 xQ. You knew of the death of Mr. Fayerweather on the 15th of November, did you not?

A. By report. I did by report, yes.

97 xQ. You knew that he left a widow?

A. Yes.

98 xQ. And you know where she resided?

A. Well, I knew where Mr. Fayerweather had resided, and of course I assume that she resided there.

99 xQ. When did you last see John B. Reynolds prior to the time that you have filed your cross-bill?

A. I have seen him during this summer.

100 xQ. Prior to the time of the filing of your cross-bill?

A. Yes.

101 xQ. Did you have any convetsation with him upon the subject of filing the cross-bill in this action?

F. 2279

A. I do not think I did.

102 xQ. Did you appraise him that you intended filing a cross-bill?

A. No, sir.

103 xQ. Did he request you to file a cross-bill?

A. No, sir.

104 xQ. Was that cross-bill filed by you at the request of through the instrumentality of John B. Reynolds?

A. No.

105 xQ. Who was Frank W. Eldredge, Mr. Fiero?

A. He was a gentleman who was then living in Binghampton, and a client of mine.

F. 2280

106 xQ. A relation of yours?

A. Yes, by marriage he is a second or third cousin of my wife.

107 xQ. You know Mr. William Blaikie, the solicitor ror the Complainant?

A. I do.

108 xQ. How long have you know him?

A. I think I have perhaps known Mr. Blaikie about twenty years.

109 xQ. When did you first speak to Mr. Blaikie with reference to this will of 1878?

A. I don't know that I ever spoke to him about it.

110 xQ. On the will of 1880?

A. Well, I don't remember.

111 xQ. What is your best recollections?

A. I probably talked with Mr. Blaikie—possibly in reference to that 1880 will—I do not remember precisely, I could not fix the date.

112 xQ. Well, how many years ago?

A. I think he might have asked me if I had a copy of the will of 1880 a few years ago.

F. 2281

113 xQ. How long ago?

A. Possibly five years ago. I could not fix the date. I did not charge my mind with it.

114 xQ. How long have you known Roger M. Sherman?

A. I have probably known Mr. Sherman fifteen years, possibly twenty.

115 xQ. When were you first spoken to by Mr. Sherman with reference to filing this cross-bill?

A. I don't think I could fix the date.

116 xQ. Well, your best recollection?

F. 2282

A. Within a year probably, within the year, probably during the summer of 1901.

117 xQ. That was the earliest time?

A. Yes, I think so.

118 xQ. Did Mr. Sherman come to you or did you go to him?

A. Mr. Sherman and I meet very frequently, as we are commuters over the same road, New Haven Railroad, and I could hardly say that he came to me or that I came to him. Meeting on the cars probably first opened the subject; if you want to get at when we first talked about

the thing it was on the New Haven Railroad coming to New York.

119 xQ. How long ago was thvt?

A. Oh, we have discussed it more or less for several months, certainly, probably not less than three or four months; further than that I do not think I could say.

120 xQ. You knew Mrs. Fayerweather, did you not, Mr. Fireo?

A. Yes.

F. 2283

121 xQ. And were in the habit from time to time of going to the house in 57th street?

A. Oh, no, I was not there often—very seldom.

122 xQ. But you enjoyed personal acquaintance with her?

A. I did not know Mrs. Fayerweather very well.

123 xQ. Did you at any time arter the death of Mr. Fayerweather apprise Mrs. Fayerweather of the will of 1878 which you have produced here to-day, or the will of 1880 to which you have referred?

A. No, sir.

124 xQ. Did you apprise her either directly or indirectly, Mr. Fiero?

F. 2284

A. No sir.

125 xQ. Or did you ever seek to convey to her a knowledge of the existence of these two instruments?

No, I do not think I did. I do not remember anything of the kind.

126 xQ. Although you had at that time a knowledge of the fact that efforts were being made to secure the probate of testamentary papers of a subsequent date to these two papers?

A. No, Mrs. Fayerweather didn't communicate with me on the subject, nor did I with her.

127 xQ. Has Mr. Sherman ever acted as attorney and solicitor for you in any other litigation than ths, Mr. Fiero?

A. I think I have retained him in other matters, yes, sir.

128 xQ. As counsel?

A. Yes sir.

129 xQ. Were those matters in which you individually were a party, or as attorney?

F. 2285

A. I don't think I have employed him in any litigation where I was a party directly myself; as plaintiff, nor

130 xQ. Mr. Fiero, I wish you would tell me of the arrangement by which your time to plead was carried along, your time to plead to the cross-bill filed by John B. Reynolds?

A. It was by number of stipulations and extensions signed by Mr. Blaikie. That is all the arrangement there was.

131 xQ. What was the reason for extending yonr time in the way that you have indicated?

F. 2286

A. The reason was probably because I had doubts whether I wanted to make any plea in the action. I had some question—there was considerable question in my mind whether it was necessary for me to do so. It seemed to me perhaps that the cross-bill that had already been filed in the action was sufficient to establish the will of 1880. As near as I can remember it, that cross-bill, among other things, asked as part of the relief that the 1880 will be established, and I think it annexed a copy of the will of 1880.

132 xQ. But the determination?

A. There was considerable discussion I know between Mr. Sherman and myself on that point, as to whether or not we should or should not put in a plea, and I think that was the reason of these extensions.

133 xQ. But the determination to file the cross-bill on your part was not reached until after Mr. Blaikie had been substituted as attorney or solicitor for the complainants in the main bill?

A. Mr. Blaikie substituted?

F. 2287

134 xQ. Yes, sir.

A. Well, I could not say as to that, Mr. Bovee. I left the matter in charge of Mr. Sherman.

Mr. Bovee: That is all.

Re-direct examination by Mr. Blaikie:

135 RDQ. Mr. Fiero, when were you last in the office of Mr. Ritch and his partners connected with them in any way?

A. You mean connected with the office?

F. 2288

136 RDQ. Yes, in any capacity?

A. I think about 1877.

137 RDQ. Did he ever ask you anything about any papers of Mr. Fayerweather's or connected with Mr. Fayerweather's affairs?

Mr. Bovee: Who?

Mr. Blaikie: Mr. Thomas G. Ritch.

Mr. Bovee: Objected to as irrelevant and immaterial.

138 RDQ. Where they were or anything about them?

A. Do you mean during the time I was with them or subsequently?

139 RDQ. I had meant in the question only while you were with them. I will change it. Did he ever ask you as to the whereabouts of papers of Mr. Fayerweather's?

Mr. Bovee: Objected to as irrelevant and immaterial to the issues presented upon the special plea; as too indefinite and remote.

F. 2289

140 RDQ. Did he or didn't he?

A. Yes.

141 RDQ. When—at what time if more than one, and during what years?

A. Well, do you mean subsequent to the death of Mr. Fayerweather?

142 RDQ. I will take that period. I will deal with that now.

A. After the death of Mr. Fayerweather, Mr. Ritch inquired what papers I had of Mr. Fayerweather, or whether I had any original wills, or copies and memoranda.

F. 2290

143 RDQ. Did he ask you anything else after the death of Mr. Fayerweather, directly or indirectly, in regard to Mr. Fayerweather or his affairs?

Mr. Bovee: Objected to on the ground that it is irrelevant and immaterial to the issues presented upon the special plea.

A. His inquiry was directed more particularly as to what papers I had and as to getting copies, which I think I furnished at his request, of such papers as I had.

144 RDQ. Did he make that inquiry more than once?

A. A number of times, both he and Judge Arnoux.

Mr. Bovee: Same objection.

145 RDQ. During what year or years?

Mr. Bovee: Same objection.

A. Well, they did during the pendency of the probate proceedings and subsequently.

146 RDQ. How late subsequently?

Mr. Bovee: Same objection.

A. Well, I think Mr. Ritch has questioned me in regard to it since these proceedings here have been pending.

147 RDQ. Within what time, sir?

F. 2291

A. But when you ask me to fix the dates I do not remember.

148 RDQ. What do you mean by "these proceeding here?"

A. I understand these have been pending for several years. I do not know how long.

149 RDQ. Since June 29th, 1897.

A. I do not remember the dates, Mr. Blaikie, it would be impossible for me to say.

150 RDQ. Has he within five years asked you for a paper or copy of any paper referring to Mr. Fayerweather or his affairs?

F. 2292

Mr. Bovee: Same objection.

A. Within five years? I believe that he has; I would not be sure of it.

151 RDQ. How late after the probate proceedings, did he ever ask you for any such papers as that?

Mr. Bovee: Same objection.

152 RDQ, As late as what year?

A. Well.

153 RDQ. The Truax trial was in the spring of 1894. Was it as late as that?

A. Oh, yes, since then.

154 RDQ. What papers did he ask for?

Mr. Bovee: Same objection.

A. Well, Ritch said he did not know but what I might have some executed wills and if I had he would like to have me produce them, and I think I gave him copies. I think I gave him, among other things, a copy of this paper.

155 RDQ. And what were the other things?

Mr. Bovee: Same objection.

F. 2293

A. I think I gave him a copy of the will of 1880, although I understand he had the original.

156 RDQ. Did he say why he wanted these copies?

Mr. Bovee: Same objection.

A. No, he did not.

157 RDQ. Did he see you or write you?

Mr. Bovee: Same objection.

A. He came to see me several times at 11 Wall street.

F. 2294

158 RDQ. In regard to these matters?

A. Yes, several times, I would not remember the years, though.

159 RDQ. He gave no reason at any of these times why he wanted these papers?

A. He did not.

160 RDQ. Did he strive to get this original will from you?

Mr. Bovee: Same objection.

161 RDQ. Did he ask you for it?

A. I don't think he gave any reasons.

162 RDQ. Bnt did he try to get the original?

A. Oh, yes, he wanted me to give him all I had.

163 RDQ. The original papers?

A. Letters, memoranda, wills and everything.

164 RDQ. Did he mention any rights he had to them, or any ground for that request?

Mr. Bovée: Same objection.

A. No.

165 RDQ. What did he say he wanted them for, besides asking for them—anything, and if so what?

F. 2295

Mr. Bovee: Same objection.

A. Why, the substance of it was that he did not care to keep them. He said he supposed I would be glad to turn them over, or something of that sort.

166 RDQ. But he made this application to you several times?

A. Yes.

167 RDQ. Did he come to your office personally to see you about them?

A. Yes.

168 RDQ. Did he ever come to your office in the Wool Exchange Building about them?

F. 2296

A. No, I do not think he did. I think it was at 18 Wall street and 11 Wall street.

169 RDQ. Did he express himself in any way when you did not deliver the originals to him? If so, what did he say?

Mr. Bovee: Same objection.

170 RDQ. Of any of these papers?

A. No, I do not remember that he said anything in reference to anything further.

171 RDQ. Did you ever see the will of 1880?

A. I drew the will of 1880.

172 RDQ. And when did you last?

A. I had the impression that I had one of 1882 but that I have not been able to find.

173 RDQ. When did you last see the will of 1880?

Mr. Bovee: Same objection.

A. Delivered to Mr. Fayerweather on the day it was executed.

174 RDQ. That was the last time you saw it?

A. That was October, 1880.

F. 2297

175 RDQ. And since then did Mr. Ritch ask you for it, since the 2nd of October, 1880?

A. No, Mr. Ritch's question was whether I had or had not executed wills or memoranda of Mr. Fayerweather and if I had he would like them.

176 RDQ. And gave you no reason why?

A. No, sir, I do not believe he thought it was necessary to give any reasons.

177 RDQ. And some part of this inquiry or some one of these inquiries may have been late as the Truax trial or later?

F. 2298

A. Oh, yes, some of them were during the pendency of that college suit.

178 RDQ. And was the 1880 will discussed or referred to in conversation or conference between you and him at that time?

A. I think it was mentioned; I do not know as there was any particular discussion about it.

179 RDQ. Did he say where it was?

Mr. Bovee: Same objection.

A. Yes, I think he said Mr. Fayerweather had brought it up to his office.

180 RDQ. And that he, Ritch, had it?

A. Yes.

181 RDQ. Besides wills of Mr. Fayerweather's and besides memoranda relative to his affairs, what other paper or papers, if any, did Mr. Ritch ask you for?

Mr. Bovee: Same objection.

A. Letters, memoranda—well, generally as to what papers I had relating to the——

182 RDQ. Never giving any reason?

A. No, he assigned no reason for it.

F. 2299

Re-cross examination by Mr. Bovee:

183 RXQ. Mr. Fiero, how many years did you say you were in the office of Arnoux, Ritch & Woodford?

A. I think it was four years.

184 RXQ. In all that period of time you were a member of the bar?

A. No, I don't think I was. I probably was a member of the bar during two of those four years.

185 RXQ. And your duties in the office pertained particularly to the drafting of wills and the probate of wills, did they not?

F. 2300

A. That was part of the work in our department.

186 RXQ. Well, the probate of wills was particularly in your charge as clerk of the office, was it not?

A. I think it was.

187 RXQ. And in that capacity you became familiar with the law relative to the probate of wills especially, did you not?

Mr. Blaikie: Objected to on the same grounds as before.

A. Yes.

188 RXQ. You have referred to 18 Wall street; did you have an office in 18 Wall street at one time?

A. Oh, yes.

189 RXQ. In what years.

A. Oh, I think I had an office from 1882 or 1883 up to probably 1891.

190 RXQ. That is, a law office?

A. We were certainly there seven or eight years in 18 Wall street.

191 RXQ. And then you had an office at 11 Wall street? A. Yes.

F. 2301

192 RXQ. That was a law office? A. Yes.

193 BXQ. In what years were you there?

A. We were at 11 Wall street probably from about 1900 or 1891 up to 1897, and I had an office also in the Wool Exchange Building for two years, 1897, 1898 and 1899 perhaps—no, up to 1898, we moved down to William street.

194 BXQ. When you first heard of the probate contest over the will and codicils of Mr. Fayerweather, did you go to the Surrogate's Court to examine the papers which were propounded as his will and testament?

F. 2302

A. No, sir.

195 RXQ. Nor did you send anybody there to examine those papers? A. No, sir.

196 RXQ. Made no inquiry with reference to it whatever? A Not the slightest.

197 RXQ. Did you ever go to the Surrogate's Court, Mr. Fiero, to examine those papers which were propounded and admitted to probate as his will and codicils? A. No, sir.

Adjourned to November 7th, 1901, at 2 p. m.

JOSHUA M. FIERO,

Signed and sworn to before me this 4th day of June, 1902.

JOHN A. SHIELDS,
Examiner.

TESTIMONY RELATING TO EXHIBIT 78.

Argument of John E. Parsons before Justice Truax.

F. 2303

JOHN B. REYNOLDS, called as a witness on behalf of the complainants, being duly sworn, testified as follows:

Direct Examination by Mr. Blaikie:

1 Q. Were you present during the trial before Mr. Justice Truax of the Five College action?

A. I was.

2 Q. Each day?

A. Every day.

3 Q. And did you see Mr. Parsons there, Mr. John E. Parsons?

F. 2304

Mr. Bovee: I object to it as incompetent, irrelevant and immaterial to the issues presented upon the special pleas.

A. I saw him every day he was there, and I think he was there every day.

4 Q. When the plaintiffs rested who opened the case for the defense in your hearing, if you know?

Mr. Bovee: This is objected to as irrelevant and im-

material to the issues presented upon the special pleas, and incompetent.

A. John E. Parsons.

5 Q. Was any record kept of that opening to your knowledge?

Mr. Bovee: Same objection.

A. Yes, sir.

6 Q. By whom?

F. 2305

A. By the stenographer of the Court, which was printed so as to deliver to the several parties the next morning.

7 Q. Who delivered it to you, if you know?

Mr. Bovee: Objected to as irrelevant and immaterial.

A. Mr. John R. MacArthur had charge of the printing, and I suppose he delivered it to us all. I received mine the morning following every day. I cannot say that he personally delivered it to me, but I think he did.

F. 2306

8 Q. Did your hear Mr. Parsons make that opening address in behalf of some or all of the defendants?

Mr. Bovee: Objected to as irrelevant and immaterial to the issues presented upon the special plea and incompetent.

A. I did.

9 Q. (Handing paper)—Look at that paper and state whether or not that is the printed statement that was given by Mr. MacArthur at the time to you, if you know?

Mr. Bovee: Same objection.

A. It is.

10 Q. Have you read it over to-day?

Mr. Bovee: Same objection.

A. Yes, sir.

11 Q. Does it or not state what Mr. Parsons said at that time?

Mr. Bovee: Same objection.

A. It does.

F 2207

Mr. Bovee: Cross-examination reserved.

Mr. Blaikie: I offer in evidence the paper shown the witness commencing with the words "Mr. Parsons: Shortly after Mr. Fayerweather's death," on page 231, and ending with the words, "this most bountiful gentleman," on page 241, and will ask that it be incorporated in the minutes.

Mr. Bovee: This is objected to as irrelevant and immaterial to the issues presented upon the special pleas and incompetent as not the authorized record of the proceeding on the trial before Judge Truax.

F. 2208

The paper was marked Complainants' Exhibit No. 2, November 18th, 1901, C. B.

Complainants' Exhibit No. 2 is as follows: (See Appendix of Exhibits No. 78 pages 432 to 445.)

COMPLAINANTS' PROOF.

NEW YORK, November 20th, 1901.

Adjourned to November 22nd, 1901, at 2 p.m.

COMPLAINANTS' PROOFS.

NEW YORK, November 22, 1901.

Met pursuant to adjournment. Present: The Examiner, Mr. Blaikie, Mr. Bovee, Mr. Parsons and Mr. Stimson.

F. 2309

JOHN B. REYNOLDS, recalled for further examination, testifies as follows:

Cross examination by Mr. Parsons:

12 xQ. Did Mr. Blaikie make an argument at the trial before Judge Truax?

A. At the close of the trial.

13 xQ. Before Judge Truax?

A. He may have made some short arguments during the trial, but I do not think he did at the close of it. It was made by Col. James, if I remember right.

F. 2310

14 xQ. Do you not remember what occurred upon that trial?

A. There are some things that are impressed on my mind more firmly than others.

15 xQ. Have you not undertaken to testify from memory literally to what you claim to have been said by Mr. Parsons?

A. No, sir.

16 xQ. What is that?

A. The substance; in substance I testified, and my

memory was refreshed from time to time, and particularly the last time, on the day before I came in here to testify. I remember it as I remember a passage of scripture; I could not remember exactly every word, but the substance of the whole of it I do recall.

17 xQ. Have you any independent memory of anything that was said by Mr. Parsons?

A. Yes, sir.

F. 2311

18 xQ. You are referring to what occurred on the Truax trial?

A. Yes, sir.

19 xQ. And you mean seriously to be understood you cannot remember whether Mr. Blaikie did or did not make an argument at the close of the trial?

A. My impression is that Colonel James made that argument. Mr. Blaikie may have made some part of it, but I would not be willing to say, without refreshing my memory in regard to it. He did not impress me with anything he said as strongly as that which Mr. Parsons said on one particular point.

F. 2312

20 xQ. Was Mr. Blaikie present at the trial?

A. Yes, sir.

21 xQ. On whose behalf?

A. I think the executor of Mrs. Fayerweather, and the nieces of Mr. Fayerweather.

22 xQ. What is the name of the executor of Mrs. Fayerweather?

A. J. B Reynolds.

23 xQ. Yourself?

At that time Mr. Beardsley and myself.

24 xQ. Can you remember that Mr. Blaikie did make

an argument, and that he began in these words: "If your honor please, I observe a remarkable physiological fact this morning. The hour that you gave to plaintiffs for opening had one hundred and ten minutes in it. I suppose that each of our hours will have the same length of time?"

Mr. Blaikie: The question is objected to as not cross-examination, and as incompetent, irrelevant and immaterial.

F. 2313

A. Those words are familiar to me, but I cannot say that Mr. Blaikie used them; either he or Colonel James. I have not read them since that occasion.

25 xQ. When were those words used by Colonel James or Mr. Blaikie?

A. I would't want to say they ever were, but they are familiar words to use on such an occasion. The circumstances were such as would naturally call for some such request, and at some stage, in some Courts somewhere I think almost the same words have been used maybe two or three times.

F. 2314

26 xQ. By whom?

Mr. Blaikie: Same objection.

A. Either Col. James or Mr. Blaikie. I think in the Court of Appeals something of that kind took place.

27 xQ. Did not Mr. Blaikie in an argument at the close of the trial, use this language: "In 1875 Mr. Fayerweather seems to have had in mind to give largely of his estate to institutions. In 1880 his thoughts took definite shape by giving to fourteen institutions about one million six hundred thousand dollars, and also by giving the residue to his executors in trust. The will is before your Honor, to be divided among those fourteen institutions.

In 1884 he enlarged the number of the institutions, and he enlarged the amount he gave them. He then had twenty institutions. He gave them two million one hundred thousand dollars, and he also by the will of October 6th, 1884, gave those twenty institutions the residue, giving it to his executors to be divided among them share and share alike. Sixty-eight days later he made a codicil taking that residue away from those twenty institutions and giving it to the two men who had been named as executors, not, however, in any capacity officially, but as individuals absolutely, and

F. 2315

to their heirs share and share alike"?

Mr. Blaikie: Same objection.

A. I have no such recollection.

28 xQ. You mean that he did do so according to your recollection? Exactly what do you mean?

Mr. Blaikie: Same objection.

A. I mean that the statement of the case as read that it came from the complainants, what Mr. Ritch or Mr. Parsons said. It does not seem to me as though Mr. Blaikie would say anything about an 1875 will; I don't think he knew anything about it at that time.

F. 2316

29, xQ. Did not Mr. Blaikie on the same occasion, and in an argument made at the close of the trial, allude to Mr. Fayerweather's want of early education, to his having risen from poverty to affluence.

A. No, sir.

30 xQ. One moment—And follow that by saying, "That man had gotten there, and he had in 1875 shown his purpose; in 1880 he showed his purpose; in 1884 he showed his purpose to give to other men what he had been deprived of, an education"?

Mr. Blaikie, same objection.

A. I have no recollection of his ever having said anything of the kind; I don't believe he did.

31 xQ, Did he not on the same occasion, and in an argument then made by him say, referring to Mr. Fayerweather. "In 1888 he made a codicil and he made Henry B. Vaughan a co-executor?

Mr. Blaikie: Same objection.

A. That fact is well established in my mind.

32 xQ. You mean the fact that Mr. Blaikie said so?

A. No, sir, that such was the case.

F. 2317

33 xQ. I am asking you what was said by Mr. Blaikie?

Mr. Blaikie: Let him finish his answer.

A. Please read what I said.

(Answer read).

The witness: And by so many different repetitions of it that Mr. Blaikie had said it at that time I would not likely remember it, and I do not remember of his saying so.

F. 2318

34 xQ. Did he not on the same occasion, and in an argument then made by him, say: "In 1889 he makes another one (another codicil), not of much importance, and there are a few things written down on a memorandum about the time of the codicil. In 1890 he makes another codicil. We had mighty hard work to find out what was in it; but at last and most reluctantly the man who caused it to be put in the fire told what was in it. He told that he took that three millions of dollars nearly of residue and carried it back to the institutions named in that will, and it has in no way been contradicted"?

Mr. Blaikie: Same objection.

A. What is the question?

35 xQ. (Question repeated).

A. It is barely possible that Mr. Blaikie said that, but I think more probable that it was said by Mr. Root, Mr. Bishop and barely possible by Colonel James.

36 xQ. Assuming it to have been said by either of the the persons whom you have mentioned, what was the codicil referred to?

Mr. Blaikie: Same objection.

A. Now if you will read the part relating to F. 2319 that codicil—

Mr. Parsons: Read the question.

37 xQ. (Question repeated)

Mr. Blaikie: Same objection.

A. I should understand it to be the codicil of November 11, 1890, which was drawn by Prescott Hall Butler and kept in the possession of Henry B. Vaughan, and destroyed by him in the kitchen of Mr. Fayerweather, without Mr. Fayerweather's knowledge, a few hours before he died.

38 xQ. Were you there?

Mr. Blaikie: Same objection.

F. 2320

A. No, but it is a matter of history in the evidence, and I have it from fhe party who accompanied Mr. Vaughan and who, by his instructions, took the envelope which he said was that, afterwards, and requested her to put it into the fire, which she did without question, not knowing what it was, and does not know what it was today, and never dreamed of its being the codicil of the 11th until Mr. Vaughan testified to it in Court.

39 xQ. Have you any objection to mentioning the name of the person who actually did put that paper in the fire?

Mr. Blaikie: Same objection.

A. Not the slightest.

40 xQ. Be kind enough, then, to do so?

Mr. Blaikie: Same objection.

It was the hand of Mrs. Reynolds now, but the mind of Henry B. Vaughan.

F. 2321

41 xQ. It was the mind of Henry B. Vaughan that put the paper in the fire I understand you to say?

Mr. Blaikie: Same objection.

A. Yes, sir.

42 xQ. You swear to that under oath?

A. I do, so far as my knowledge goes, based upon the information which I allude to.

43 xQ. That information was that it was put in the fire by Mrs. Reynolds, was it not?

Mr. Blaikie: Same objection.

F. 2322

A. It was by request of Mr. Vaughan handing her a paper or an envelope, without her looking into it, when her brother was dying, when she had not had a moment's sleep for twenty-four hours and nothing to eat for eighteen hours, exhausted physically, bodily, she would have done anything that Mr. Vaughan would asked her to do that day, because she had most implicit confidence in Mr. Vaughan at that time. Mr. Fayerweather had just told her that he gave Mr. Vaughan twenty-five thousand dollars, and that he would look after the interests of his family, to go to him for anything that she wanted, and he would assist her and charge nothing for

it. He says, "I have paid him well for it." Therefore she had no occasion at that hour to mistrust or question anything that Mr. Vaughan requested. She relied upon him as the only staff she had to lean upon; did what he asked her to do, and only thought it was a paper of no importance or related in any way to the will.

Mr. Parsons: Will the stenographer read what he said about $25,000.

(Answer read.)

F. 2323

The Witness: I want to add a little to that. Mr. Fayerweather's remarks referring to what he had given Mr. Vaughan also included twenty-five thousand dollars which he had given to Mr. Myrick and fifty thousand dollars which he had given Morris B. Beardsley, and my remarks that Mr. Vaughan was the only staff she had to lean upon should include these two other gentlemen, because—

44 xQ. Which two other?

F. 2324

A. Myrick and Beardsley, because Mr. Fayerweather spoke of them at the same time he referred to Mr. Vaughan. That was during his last talk after he knew that he was not to live through the day, the last talk he had of any account with her or his wife. After having said this to her he requested her to call his wife who was in the extension room, as he wished to talk to her and give her his parting counsel. His strength was so exhausted that he only said a few words to her, she breaking down in the effort and not knowing by his telling her, what he had given to Mr. Myrick, Mr. Vaughan and Mr. Beardsley for this purpose.

Mr. Parsons: Counsel for the defendants objects to so much of this answer as is irresponsive to the question, and contend that the witness has no right under the pretence of answering a question to put upon the record long statements in respect of matters about which he does not claim to have had any personal knowledge and of which he can have no personal knowledge.

Mr. Blaikie: Counsel for the other side object to instructions from counsel for the defendant to the witness as to what he shall testify to; he is the best judge
F. 2325 of that himself; and object to any attempt to influence him at all.

45 xQ. Referring to the statements made, if by any one, thaf in 1890 Mr. Fayerweather made another codicil, and that the man who caused it to be put in the fire told what was in it, have you not in subsequent litigation claimed that you did not know what was in it, and that neither Mrs. Fayerweather's executor nor the nieces knew what was in it?

Mr. Blaikie: That is objected to on the same grounds, and that the witness has not testified that he did know what was in it; simply that Mr. Vaughan had said what was in it.

F. 2326

A. We have asserted that we did not know its full contents. The names of parties mentioned in it Mrs. Reynolds does know to a certain extent, and we know nothing as to what had been put in it except the meagre information which Mr. Vaughan has given which is in the testimony at the Truax trial. He could not remember anything but one point, if I remember right.

46 xQ. Do you mean by your preceding answer to say that this Butler codicil was read by Mrs. Reynolds?

Mr. Blaikie: Same objection.

A. Well, I wouldn't say it was, but she said she read a part of it; told me so.

47 xQ. Before or after it was executed?

Mr. Blaikie: Same objection.

A. My memory is it was the memorandum which Mr. Vaughan drew under dictation of Mr. Fayerweather, that she went to the drawer and took it out at Mr. Fayerweather's request, and to identify it read to Mr. Fayerweather so that he might know, he being unable to

F. 2327 read it, if that was the paper that Mr. Vaughan had sent his son there for. She could have read it all if she had any curiosity. As I recollect she told me, and I think it is a matter in evidence, that she read the names of Mrs. Fayerweather, herself, one of her sisters-in-law, and the nieces, and Mr. Fayerweather says, "Yes, that is it." Opposite those names were bequests which Mr. Vanghan did not see fit to put in the deed of gift. He did put in the provision regarding the marriage of Mrs. Reynolds in the deed of gift; but that codicil also had that provision in it, as she understands it.

Mr. Parsons: The answer of the witness is objected to so far as it is irresponsive to the question, and the counsel for the defendants again object to the

F. 2328 witness under pretence of answering questions putting upon the record unverified statements about which he does not profess to have any personal knowledge, and in respect to which from the nature of the case he can have no personal knowledge.

The witness: The witness would like to add that the counsel knows the source of my information before he asks the question, and he must accept what information I am able to give him in answer to him.

Mr. Parsons: And we move to strike out that portion of his answer—

Mr. Blaikie: What portion? Specify.

Mr. Parsons: All that relates to some paper of which the witness speaks as a memorandum.

Mr. Blaikie: What was it that you wanted to add, Mr. Witness?

The witness: That the counsel knows the source of my information when he asks tne question and he must accept the information which I am able to give him.

48 xQ. Have you a copy of what, upon your recent examination by Mr. Blaikie you called a printed copy of what, occurred on the Truax trial from day to day?

A. Yes, sir.

F. 2329 49 xQ. Where is it?.

Mr. Blaikie: Same objection.

Objection withdrawn.

A. I may not have every day, but I think I have every day. It is at my office 35 Nassau street.

50 xQ. Does it include the arguments of counsel?

A. It includes everything that was taken by the stenographer on that occasion as I understand it.

51 xQ. Down to the final submission of the case to Judge Truax?

A. I think so.

52 xQ. Have you ever seen a stenographic copy of the proceedings before Judge Truax?

F. 2330

A. Not to read them myself. I understand that Mr. McArthur was appointed by all parties to superintend the printing of the record each day, and that he furnished, by the New York Evening Post having printed it at night, the copy of the previous days proceedings to each party.

53 xQ. Printed from the stenographic report.

A. Yes, sir. And it is a copy which was given to me by Mr. McArthur, or through him, as a copy of the proceedings of the previous day, day by day, and it is that from which I read, or which I testified to, in my direct examination.

54 xQ. We shall wish to examine you with reference to that and ask that you will produce it upon this examination?

Mr. Blaikie: You mean the whole?

Mr. Parsons: Yes.

Mr. Blaikie: All we have got you shall have.

55 xQ. And we will ask you to read over the arguments of Messrs, Blaikie and James preliminary to your further examination so that you may be able to testify about it.

F. 2331

Adjourned to Tuesday, November 26, 1901, at 2. P. M.

COMPLAINANTS' PROOFS.

NEW YORK, November 25th, 1901.

Met pursuant to adjournment. Present: The Examiner, Mr. Blaikie, Mr. Parsons, Mr.
F. 2332 Bovee, and Mr. Niles.

Adjourned to November 27th, 1901, at 2 p. m.

Met pursuant to adjournment. Present: The Examiner, Mr. Blaikie, Mr. Parsons, Mr. Bovee and Mr. Niles.

Continuation of the cross-examination of *JOHN B. REYNOLDS.*

By Mr. Parsons:

56 xQ. Have you since the last session ascertained whether in your possession is what purports to be a copy of arguments of counsel on the trial before Judge Truax?

A. I find they are not complete; I do not find any of the closing arguments on the part of either counsel. I supposed they were all there, but I had not looked for

them; and I find they are not there, probably never were delivered to me; they may have been to others. I have down to page 736; that is the last page I have of that, of the printed matter.

Mr. Blaikie: Note the same objection to that question.

57 xQ. Have you refreshed your recollection upon the question whether, in an argument upon the Truax trial,

F. 2333

Mr. Blaikie stated what form part of question 34 on your present examination, page 2506?

Mr. Blaikie: Same objection.

A. I understood you to ask the question as relating to argument preceding the trial, introductory arguments.

58 xQ. Our question is general. What we wish to ascertain is whether you have refreshed you recollection upon the question of whether, in any argument made during the Truax trial down to the submission of the case to Judge Truax, Mr. Blaikie said what is incorporated as part of cross-question No. 34, which you may read if you wish. (Handing paper.)

F. 2334

Mr. Blaikie: Same objection.

A. I have endeavored to refresh my recollection of it from the data in my possession, and I found that I had not that data. I think I remember in some of the arguments that that statement was made, and it is probable Mr. Blaikie made it.

59 xQ. Is it possible that Col. James made a statement to the same effect?

Mr. Blaikie: Same objection.

A. I think it might be possible, but I would not want to testify that he did or did not.

60 xQ. We ask you the same question with reference to the passage which forms part of cross-question No. 27. You may read that, if you wish, page 2504.

Mr. Blaikie: Which passage? It is rather long, Mr. Parsons.

Mr. Parsons: It is all quoted, "In 1885," and so on.

Mr. Blaikie: Same objection.

F. 2335

A. I have not refreshed my memory in regard to it. I was under the impression that Mr. Blaikie did not know of any will prior to the 1880 will. I do not now know that he had knowledge of any other will earlier than that.

61 xQ. Does that mean that Mr. Blaikie, in an argument before Judge Truax on that trial, used the language incorporated in cross-question 27 with the exception of the sentence which relates to the will of 1875?

Mr. Blaikie: Same objection. And not the best evidence, also, and not cross-examination.

F. 2336

A. It means that I do not remember sufficiently clear to testify that he did or did not.

62 xQ. That he did or did not use the language which forms part of cross-question 27?

A. Yes, sir.

62 xQ. What is your best recollection upon the subject?

Mr. Blaikie: Same objection.

A. My best recollection is that some one on that occassion used in substance those words with the exception of referring to the will of 1875, I do not have any recollection as to that.

64 xQ. When you say some one do you mean either Mr. Blaikie or Col. James?

Mr. Blaikie: Same objection.

A. Well, it might have been either of them or it might have been some one representing the five colleges.

65 xQ. What is your best recollection as to whether it was Mr. Blaikie or Col. James, and if so which?

Mr. Blaikie: Same objection.

F. 2337

A. I have had no opportunity to read the record which you seem to have, and have had no means of refreshing my memory any more than I have stated.

66 xQ. And aside from reference to the record what is your best recollection upon the mere point of whether it was Mr. Blaikie or Col. James or both who used that language?

Mr. Blaikie: Same objection.

A. Well, I should decline to think it would be Mr. Blaikie instead of Mr. James.

F. 2338

67 xQ. I ask you the same question with reference to the passage which forms part of cross-questions 29 and 30 and 31 on this examination.

Mr. Blaikie: Same objection.

A. I will make the same answer.

68 xQ. That is, that you think it was Mr. Blaikie rather than Col. James?

Mr. Blaikie: Same objection.

A. I think it was, if either.

69 xQ. And what is your best recollection as to whether one or the other did say what is incorporated in those questions?

Mr. Blaikie: Same objection.

A. Well, I think some one used those expressions, and I think it rather irritated me at tne time that they should refer to Mr. Fayerweather's being an ignorant man; and my feeling was that while he was not a graduate of a college he was the peer of any one who thus criticised him, including Mr. Ritch.

70 xQ. Did yon ever meet Mr. Fayerweather personally?

F. 2339

Mr. Blaikie: Same objection.

A. Yes, sir.

71 xQ. Then your answer means, as we assume, that you think he was the peer of Mr. Blaikie, who did use this language?

Mr. Blaikie: Same objection. Easily, Mr. Parsons.

A. In the point of technical education, no; in the point of true education, yes.

72 xQ. Where did you see Mr. Fayerweather?

Mr. Blaikie: Same objection.

F. 2340

A. I met him at Saratoga.

73 xQ. To have conversation with him?

Mr. Blaikie: Same objections.

A. Yes, sir.

74 xQ. On how many occasions?

Mr. Blaikie: Same objection.

A. Well, I do not know; they were there at the United States Hotel for a considerable time and sat at the next table. He and the people who I was with were on very intimate terms, (the family.)

75 xQ. I am asking you about conversation between you and Mr. Fayerweather. How often did that occur?

Mr. Blaikie: Same objection.

A. Oh, not so frequent as with the other members of his family.

76 xQ. You did not answer our question, which is, on how many occasions did you personally have conversations with Mr. Fayerweather personally?

F. 2341

Mr. Blaikie: Same objection.

A. I could not answer; it might have been several and it might not have been but a few.

77 xQ. Can you be quite sure that you ever had a personal conversation with him?

Mr. Blaikie: Same objection.

F. 2342

A. I should say yes; I should not want to say one or ten, or how long it was; I met him, as we often do strangers, there; and if I had met him half a dozen times I might not remember it, it is ten years ago; I know we were very familiar with the family at the time, and the people that I refer to had his cottage after he came away; and the lady, Mrs. Ross, died in his room, which naturally threw us very close together on account of the illness. She went to the depot to see them off the morning they left.

78 xQ. Does your answer mean that you cannot re-

member personally from present recollect that you ever had a conversation personally with Mr. Fayerweather?

Mr. Blaikie: Same objection.

A. Well, I should say I had, but I should not like to swear positively either way, is it very important to you, Mr. Parsons.

F. 2343

79 xQ. Have you no means of refreshing your recollection about the exact language of the argument which, upon the Truax trial, was made by Col. James?

Mr. Blaikie: Same objection.

A. I suppose the Court may have a stenographic report of it, but I have not examined it. That is the only way that I recall, that I have access to.

F. 2344

80 xQ. Can you from memory recall that in substance or effect Col. James at the beginning of his argument said that he proposed to discuss the case and the rights of those whom he represented upon the proposition that Judge Truax would find that while this devise and bequest, referring to the devise and bequest made by the instruments admitted to probate as the will of Mr. Fayerweather, was apparently absolute, it was really accompanied by such a trust as the plaintiffs claimed?

Mr. Blaikie: Same objection.

The witness: What is the question now?
(80 xQ. Repeated by stenographer.)

A. Well, I remember his opening address. Whether he used those particular words or not I could not say. They sound quite familiar.

81 xQ. Was that the gist of what he said?

Mr. Blaikie: Same objection.

A. I should presume it was.

F. 2345

82 xQ. Do you remember that he argued that proposition upon the ground, among others, of the application of the provisions of chapter 360 of the Laws of 1860 of the State of New York.

Mr. Blaikie: Same objection, and also as leading.

A. Yes, sir. I remember that that was the ground on which he would, and I suppose he did.

83 xQ. Do you remember that he argued before Judge Truax that upon the testimony Judge Truax should find, ought to find, that the releases given by Mrs. Fayerweather and the nieces were obtained by fraud and should be set aside for that reason?

F. 2346

Mr. Blaikie: Same objection.

A. I give the same answer I did before.

84 xQ. Does that mean yes?

Mr. Blaikie: Same objection.

A. It starts off with yes, and then I added the other remark, too.

85 xQ. He was very severe in dealing with the testimony about fraud, was he not?

Mr. Blaikie: Same objection.

A. Well, he ought to be, and I think he was.

86 xQ. Commented particularly upon conduct which he attributed to Mr. Ritch, conduct which he attributed to Mr. Vaughan, the action of the executors generally, and even referred to what he claimed to have been done by Mr. Parsons?

Mr. Blaikie: Same objection.

A. I do not recall his reference to Mr. Parsons' acts in the matter; the rest of it I have a clear impression that he did.

F. 2347

87 xQ. Can you not recall that he referred to a letter which Mr. Parsons had written to Mr. Coudert inviting suggestions from Mrs. Fayerweather about the disposition of the property which was devised and bequeathed to the executors?

Mr. Blaikie: Same objection.

A. I remember such a letter as being introduced and made a part of the record, and presume that Col. James referred to it in his argument; and if Mr. Parsons' conduct required severe reference to it, I presume it got it—I do not recall it particularly.

F. 2348

88 xQ. Can you remember that Col. James used substantially this language in the course of his argument before Judge Truax, there having been an adjournment pending his argument, and when his argument was resumed he saying: "Your honor will remember that my argument has proceeded upon the theory that you find the trust concealed within or ingrafted upon this residuary devise and bequest for which the plaintiffs contend, and if that trust is found we say that the releases obtained from the next of kin should be cancelled because they were obtained by those who stood to them in a

fiduciary relation, by the suppression of the truth, by the assertion of a falsehood, for a grossly inadequate consideration, and, so far as the widow is concerned, by using the position of dependence in which she was placed towards them to co-erce her consent to their wishes, accompanied also by the active threats of prolonged litigation and to her, prolonged distress as the alternative?"

F. 2349

A. I think I remember his using that language at some stage of the argument. I would like to add, he or Mr. Blaikie, Col. James or Mr. Blaikie.

89 xQ. Can you recall that in his argument before Judge Truax, Col. James commented upon the testimony of Mr. Vaughan given upon that trial and the memorandum upon Exhibit O-A of that trial, "more institutions for benefit," to this effect: "And yet if Vaughan's testimony be true, if this definite trust for those colleges is to be abandoned, and upon the imperfect recollection of this man the trust to be established, for which he contends, as the purpose for which
F. 2350 that final codicil was made, then we have got an indefinite trust, incapable of enforcement —and what is the result of that? It vacates the entire residuary devise and bequest, it passes it into the lap of the widow and the next of kin, it makes them the owners not only of the half which they would have under the Act of 1860 but of the whole of it not specifically given; and it was reserved until the trial of this case for that man Vaughan to make that revelation; not one whisper until the time he came upon the stand before your Honor that any such conversation as that with this testator had taken place. If that be true there can be but one result under the decision, and that is to

make this estate intestate as to the whole of that residum."

Mr. Blaikie: Same objection as before.

A. I have a general recollection that he did make such an argument; I could not swear to it word for word.

F. 2351

90 xQ. Does not that recall to you that it was through the counsel for the executors and in corroboration of Mr. Vaughan's oral testimony that there came in evidence Exhibit OA?

Mr. Blaikie: Same objection.

(At the request of the witness 90 XQ repeated by stenographer).

A. Well, that is my impression; I could not say who introduced it, but I do not think it would be probable, the plaintiffs did, because they had not possession of it.

F. 2352

91 xQ. Do you not recall very distinctly that this was the sequence: Mr. Vaughan gave his oral testimony, the executors' counsel put in evidence Exhibit OA to confirm it, and thereupon Col. James, upon the basis of Mr. Vaughan's testimony and the memorandum on Exhibit OA, took the position that that showed an indefinite trust, and with the result that except in so far as specific legacies were concerned Mr. Fayerweather died intestate, and that the widow and next of kin were

entitled to his estate upon the further claim that the releases were obtained by fraud.

Mr. Blaikie: Same objection.

A. That is my memory of it in general, though I have not seen the typewritten or printed arguments of either Col. James or Mr. Blaikie since their delivery.

92 xQ. Do you remember that Mr. Putney made an argument before Judge Truax?

F. 2353

Mr. Blaikie: Same objection.

A. I think he did, not as long as Mr. Root's, though.

93 xQ. Whom did Mr. Putney represent?

Mr. Blaikie: Same objection.

A. As I remember it Williams College and perhaps Amherst College.

F. 2354

94 xQ. One or more of the five colleges?

Mr. Blaikie: Same objection.

A. Yes, sir.

95 xQ. Was not this the situation in a general way, that your counsel and the counsel for the five colleges joined in urging that the device and bequest to the executors was not absolute, that the counsel for the

five colleges maintained that it was upon a trust for the institutions mentioned in the Ninth Article of the will, that your counsel claimed that the trust was indefinite and that therefore there was the case of intestacy, and that so far as concerned the question of fraud in obtaining the releases your counsel insisted that there was fraud, and the counsel for the colleges that there was not?

Mr. Blaikie: Same objection.

F. 2355

A. I think my counsel took that ground and also the one that it was an illegal trust.

96 xQ. An indefinite trust?

A. An illegal and indefinite trust, yes, sir; illegal under the Act of 1860 and indefinite as to "more institutions for benefit," and that they did claim that the releases were obtained by fraud.

97 xQ. You mean your counsel?

Mr. Blaikie: Same objection.

A. Yes.

98 xQ. And the counsel for the colleges that there was no fraud?

F. 2356

Mr. Blaikie: Same objection.

A. So far as they had anything to say on that subject I think that was their position, no fraud as to obtaining the releases, and that there was fraud as to the effort to withhold from them the fund which was willed to them as the residue; I think this was the position of the colleges.

99 xQ. Do you know Mr. Joshua M. Fiero?

Mr. Blaikie: Same objection.

A. Yes, sir.

100 xQ. When did you become acquainted with him?

Mr. Blaikie: Same objection.

A. I think I first met him seven or eight years ago, six or seven years ago.

101 xQ. Where?

Mr. Blaikie: Same objection.

A. At his office, then on Wall street if I remember right.

F. 2557

102 xQ. Was it before or after the Truax trial, or pending that trial?

Mr. Blaikie: Same objection.

A. I think it was before it.

103 xQ. How long before it?

Mr. Blaikie: Same objection.

A. Well, I could not say, but I should not think it would be a great while, perhaps during the year before it.

F. 2358

104 xQ. Do you remember the action that you brought upon the same claim as you set out in your defense to five Colleges suit, the suit that was dismissed by Judge Patterson?

Mr. Blaikie: Same objection.

A. I remember it as one that you and Ritch got $2,000 out of me for extra allowance which you ought not to have; that is the most particular thing that I can remember about it.

105 xQ. Well, perhaps then your memory will serve you sufficiently to say whether you did or did not commence such a suit.

Mr. Blaikie: Same objection.

A. I commenced a suit, I cannot say whether it was such a suit as you describe.

106 xQ. Was your first visit upon Mr. Fiero before or after you commenced that suit?

F. 2359

Mr. Blaikie: Same objection.

A. I could not remember whether it was or not; it might have been before.

107 xQ. Is that your best recollection?

Mr. Blaikie: Same objection.

A. I have not got but one quality of recollection on the subject, and that is rather indefinite.

108 xQ. We will take the best of your recollection.

F. 2360

Mr. Blaikie: Same objection.

A. Well, I gave it in my first answer, that I could not definitely recollect whether it was before or after.

107 xQ. Is it your best impression that it was prior to the commencement of that suit?

Mr. Blaikie: Same objection.

A. No, my best recollection is that I cannot tell which it was.

110 xQ. Did you see Mr. Fiero on more than one occasion about that time?

Mr. Blaikie; Same objection.

A. It is possible two, but I do not possible recall but one.

111 xQ. After an interval did you see him again?

F. 2361

Mr. Blaikie: Same objection.

A. Yes, sir.

112 xQ. After how long an interval?

Mr. Blaikie: Same objection.

A. Well, some years intervened.

113 xQ. Fix as near as you can the time when you saw him first after this interval.

Mr. Blaikie: Same objection.

F. 2362

A. Well, I should think it was two or three years afterwards.

114 xQ. In your first interview with Mr. Fiero did you tell him anything about the suit which had been commenced or which was to be commenced for the purpose of fastening a trust upon the devise to the executors in the instruments probated as Mr. Fayerweather's will?

Mr. Blaikie: Same objection, and also as leading, and also no foundation has been laid for it, and incompetant, irrelevant and immaterial, and not cross-examination.

F. 2363

A. I think the purpose of my visit was to inquire particularly about the will of 1880 that Mr. Ritch had written to Mr. Beardsley, as being one which would have to be probated if the will of 1884 was not accepted as the last will, and I wanted to learn all the circumstances about it, and my impression is that at that time I did not know the contents of it; I wanted to learn from him its contents; as by some means I had been led to suppose that he was executor in it. I think that is the situation.

115 xQ. According to your last answer must not your first call upon Mr. Fiero have been before the will of 1884 was probated as Mr. Fayerweather's last will?

F. 2364

Mr. Blaikie: Same objection.

A. It is possible that I got my information as to his being an executor in it from the record, but if so, I still say I went to see him in relation to that will.

116 xQ. The point is about the time of your first call upon Mr. Fiero. According to the answer which you gave a short time ago, if that states the fact correctly, must it not have been before the will of 1884 was probated as Mr. Fayerweather's last will? How could Mr. Ritch write about the necessity or propriety of proving the will of 1880 if the will of 1884 were not admitted to probate, after that will had been admitted to probate?

Mr. Blaikie: Same objection.

The Witness: I think your question is a little mixed, Mr. Parsons.

Mr. Blaikie: Can you answer it?

The Witness: I cannot the way it is put, if I understand it right. I will ask to have it read.

(116 xQ. repeated by stenographer.)

F. 2365

Mr. Blaikie: Same objection.

The Witness: I find it very difficult to understand the latter part of the question as related to the first part, Mr. Parsons.

117 xQ. Let me explain. You have said in an earlier answer that Mr. Ritch had written to the effect that if the will of 1884 was not admitted to probate it would have been necessary to have proved the will of 1880, have you not?

A. Yes, sir.

F. 2366

118 xQ. Now, could Mr. Ritch write any such letter as that after the will of 1884 had been actually proved?

A. No, his letter must have been written before it.

119 xQ. And must your call not therefore have been prior to the probate?

Mr. Blaikie: Same objection.

A. Not necessarily.

120 xQ. What is your best recollection, in view of what you have just stated upon that point, as to whether it was or was not prior to the probate?

Mr. Blaikie: Same objection.

F. 2367

A. I think I made a statement in my previous answer that I did not know that I had seen the contents of the 1880 will when I called there. It is quite possible that that will is a part of the Surrogate's record; if so I must have seen Mr. Fiero after that contest and had seen the printed record of that will at the time I called upon him.

121 xQ. The real point at which I am trying to arrive is whether you can now state unequivocally whether it was qefore or after the probate trial that you first saw Mr. Fiero?

F. 2368

Mr. Blaikie: Same objection.

A. Oh, after it.

122 xQ. And we understand your present testimony to mean that when you first saw him you were aware from some source or other about the contents of the will of 1880.

Mr. Blaikie: Same objection.

A. If that is a part of the record—and my impression now is that it is—then I did know of the contents as appears in the Surrogates' record. Whether I saw it there or in the Truax trial I cannot now remember. It is in one of those two records. And if it is in the Truax re-

cord and not in the Surrogates', then I saw Mr. Fiero before I knew of the contents of the 1880 will.

123 xQ. Was anything said between you and Mr. Fiero on this occasion about the propriety or necessity or otherwise of offering the will of 1880 for probate?

A. I do not remember particularly as to what was said as to the offering it for probate, I know my call had reference to what information he might give in regard to that will.

F. 2369

124 xQ. At the time of this call your position was that of claiming relief under the probate of the will of 1884 and the codicils thereto, was it not, upon the theory of a secret trust, etc?

Mr. Bovee: Same objection.

A. In part.

125 xQ. And of course you did not want any other will to come forward and defeat your position, did you?

F. 2370

Mr. Blaikie: Same objection.

A. Yes, if it would better our relations.

126 xQ. Oh, you were willing to play fast and loose, were you?

Mr. Blaikie: Same objection.

A. We were in to root out all the infidelity that had been practiced upon us wherever it was found, and were seeking for it in every place where we could find it, and we generally found some.

127 xQ. But in this mental process of yours has it not occurred to you that you were bound to be loyal to the to the court and not be inconsistent in the positions which you asked the Court to substantiate?

Mr. Blaikie: Same objection.

A. I do not remember of being in contempt of the Court except in one instance at your suggestion, Mr. Parsons.

F. 2371

128 xQ. Well, you are not very much embarrassed by any considerations of inconsistency, are you?

Mr. Blaikie: Same objection.

A. Well, I am more timid than you give me credit for.

129 xQ. When first did you learn that Mr. Fiero proposed to file what he calls or has been called or somebody thinks is a cross-bill?

F. 2372

Mr. Blaikie: Same objection. You do not state what suit the cross-bill is in or connect it in any way.

A. Well, I think I heard that he was contemplating it some time during the last year, within the year past. I knew he had the subject in his mind perhaps a little earlier than that; but that he had concluded to do it, or not, I did not know until during the last year.

130 xQ. How did you know that Mr. Fiero had this in his mind?

Mr. Blaikie: Same objection.

A. My recollection is he came in and told me.

131 xQ. Were you calling upon him about that time?

Mr. Blaikie: Same objection.

F. 2373

A. No, sir.

132 xQ. How long prior to that time had you been to see him?

Mr. Blaikie: Same objection.

A. I think more than a year.

135 xQ. When you saw him on that occasion was it with reference to my proceeding by him upon the so-called will of 1880?

F. 2374

Mr. Blaikie: Same objection.

A. It was with a view of talking with him on that subject.

134 xQ. Is there any arrangement or understanding between you and Mr. Fiero, or is he acting entirely independently?

Mr. Blaikie: Same objection. Counsel instructs the witness he need not answer.

Mr. Parsons: Do you decline to answer?

The witness: Under advice of counsel I should be obliged to.

135 xQ. Is it on the ground that it will tend to convict you of crime or of an infamous offence?

Mr. Blaikie: No objection to your answering that question, sir.

A. No, sir.

F. 3275

136 xQ. Then we ask you to answer the question.

Mr. Blaikie: Same instructions.

The witness: Then I shall have to decline.

137 xQ. Was not the so-called cross-bill of Mr. Fiero, and his action in filing the same, in pursuance of an agreement between him and you?

Mr. Blaikie: Same objection and same instructions.

F. 3276

The Witness: I decline to answer under the advice of counsel.

138 xQ. When did you make your bargain with Mr. Fiero?

Mr. Blaikie: Same objection. There is no evidence that there has been any bargain. And the same instructions.

139 xQ. We will ask you, then, whether you have not made a bargain with Mr. Fiero?

Mr. Blaikie: Same objections and same instructions.

The Witness: Same answer.

140 xQ. In other words, you decline to answer about your bargain, or whether there was a bargain?

F. 2377

A. Yes, sir.

141 xQ. Is your agreement with Mr. Fiero in writing?

Mr. Blaikie: Same objection. There is no evidence that there is any agreement. And the same instructions.

The Witness: Same answer.

142 xQ. That is, you decline to answer?

F. 2378

A. Yes, sir.

143 xQ. We ask you to produce a copy of any agreement between you and Mr. Fiero?

A. Not the slightest objection to do it, but I cannot.

144 xQ. Do you mean that you cannot under advice of counsel?

Mr. Blaikie: He did not say so.

145 xQ. If there is no advice of counsel to interfere with our examination we desire to find out all about your bargain with Mr. Fiero. Are you willing to be interrogated upon this subject?

A. Yes, I am willing to answer all the questions that my counsel does not advise me not to, or say that I am privileged not to. You have asked me a good many I just as lief answer as not, Mr. Parsons, but I must follow my counsel's advice.

F. 2379

146 xQ. What we wish to know is whether there is an agreement between you and Mr. Fiero.

Mr. Blaikie: Same objection and instructions.

The Witness: Under my counsel's instructions I must decline to answer.

147 xQ. We wish also to find what are the provisions of any agreement between you and Mr. Fiero?

F. 2380

Mr. Blaikie: Same objection and same instruction.

The Witness: Same answer.

148 xQ. Are you aware that the so-called cross-bill of Mr. Fiero was filed by Mr. Roger M. Sherman, purporting to be Mr. Fiero's attorney?

Mr. Blaikie: No objection.

A. I know he is on record as his attorney. Whether he is or not, or whether Mr. Fiero did, or not I do not know.

149 xQ. At the time that the so-called Fiero cross-bill was filed was Mr. Sherman your attorney?

A. At the time?

150 xQ. Yes.

F. 2381

A. No, sir, I think not.

151 xQ. How shortly before that had he ceased to be your attorney?

A. If you give me the date of that I think I can answer it pretty nearly.

152 xQ. Well, you may state it in weeks or days or months, according to your best recollection.

A. Well, my recollection is several weeks.

F. 2382

153 xQ. Does this answer signify that since that time Mr. Sherman has had no professional relation to you?

A. Well, I think I can say yes to that. He has some papers that I have not gotten from him yet, and I feel privileged to go to him to ask him for anything that he has or any records he has of the case. We are not on unfriendly terms, but he is not my attorney and had not been for several weeks prior to bringing the cross-bill I think, prior to Mr. Fiero's bringing the cross-bill.

154 xQ. And since that time he has sustained no professional relation to you?

A. No, sir.

155 xQ. Except that he has possession of some of your papers?

F. 2383

A. I do not know hardly where to draw that line, Mr. Parsons. I would like to. I have said that Mr. Sherman is on friendly relations, we have had no bitter fight to comfort you or discomfort you or discomfort us, although it has been with considerable inconvenience to me, I have got over that, however, and with pleasant relations left with Mr. Sherman. And he is not my counsel.

156 xQ. Is the same true of the nieces, Mrs. Achter and Mrs. Emma S. Fayerweather?

Mr. Blaikie: No objection.

F. 2384

A. I did not think I am competent to answer that, but I think it is.

157 xQ. Were not you their representative in the matter, and when you terminated Mr. Sherman's employment did you not also terminate his employment from them?

Mr. Blaikie: Same objection and same instructions.

The Witness: I decline to answer under the advice of counsel.

158 xQ. If there was no professional relation between you and Mr. Sherman at the time, he neither representing professionally you or the nieces, we desire to ask you whether any agreement or arrangement with Mr. Fiero was made through him?

Mr. Blaikie: Same objection and instruction.

The Witness: Under advice of counsel I decline to answer.

F. 2385

Mr. Parsons: Mr. Blaikie we would like you to have the testimony written out before we absolutely terminate the cross-examination, but I think we are through.

Adjourned to Wednesday, December 4th, 1901, at 2 p. m.

F. 3286

TESTIMONY OF JOHN B. REYNOLDS.

New York, December 4th, 1901.

Adjourned to December 16th, 1901, at 2 p. m.

F. 2387

New York, December 16th, 1901.

Adjourned to December 19th, 1901, at 2 p. m.

New York, December 19th, 1901.

Adjourned to December 23rd, 1901, at 2 p. m.

F. 2388

New York, December 23rd, 1001.

Met pursuant to adjournment. Present: The Examiner, Mr. Blaikie and Mr. Bovee.

Mr. Blaikie: Have you any further cross examination?

Mr. Bovee: No.

Mr. Blaikie: I have a few questions to ask.

TESTIMONY OF JOHN B. REYNOLDS.

Continuation of the examination of *JOHN B. REYNOLDS.*

Re-direct examination by Mr. Blaikie:

159 RDQ. You have been asked by Mr. Parsons as to your memory of his opening speech for the defense before Judge Truax at the trial there, and you have testified that you remembered the substance of it. You have also testified that you did not recall a speech that I made at that time. Have you any explanation to offer as to why you remember Mr. Parsons' speech or any of it and not mine? If so, what is it?

F 2389

Mr. Bovee: Objected to as irrelevant and immaterial and not within the issues presented by the special pleas, and incompetent.

A. There is one part of Mr. ——, two parts of Mr. Parsons' speech which impressed my mind indelibly.

160 RDQ. What were they?

Mr. Bovee: Same objection.

A. The one where he ——

F. 2390

161 RDQ. Give the substance if you cannot remember the words.

A. Where he said if these colleges who had brought this suit, as I understood, had dared to suggest that they had any claim upon the residuary estate, the outcome would have been very different. And the second point was where he said that it was for them to

say whether they should withhold even the specific bequests.

162 RDQ. Whom do you mean by them?

A. I am not undertaking to quote the exact words of Mr. Parsons, but that is the substance of what he said, and it so impressed my mind. What is the next question?

163 RDQ. Whom do you mean by them? You say it was for them to say?

F. 2391

Mr. Bovee: Same objection and also upon the ground that the printed record of Mr. Parsons' argument is the best record.

A. I said he said "it was for us to say." I suppose he referred to his clients, the executors, Mr. Bulkley, Mr. Ritch and Mr. Vaughan.

Mr. Bovee: I move to strike out the supposition of the witness as incompetent.

164 RDQ. Had you any reason, and if so what was it, to know to whom he referred when he stated it was for them to say? What was that reason if you have one?

F. 2392

Mr. Bovee: Objected to an incompetent, irrelevant and immaterial and not within the issues presented by the special plea, and calling for the opinion and conclusion of the witness and not for facts, and that the record of what was actually said by Mr. Parsons is the best evidence and not the supposition of the witness.

(Question No. 164 repeated by stenographer.)

A. Some of the attorneys for the Five Colleges had given me the same information, that they did not dare

to raise that question until they had received the larger portion of their specific bequests.

165 RDQ. You have testified that Mr. MacArthur sent from the offices of Messrs Arnoux, Ritch & Woodford daily statements of the previous day on the Truax trial. Did you ever since that trial at any time read over this speech of Mr. Parsons as it so came in to you?

Mr. Bovee: Objected to as immaterial, irrelevant and incompetent, and not within the issues presented upon the special pleas.

F. 2393

A. Yes, sir, I have.

166 RDQ. State what effect if any it had upon your mind at the time?

Mr. Bovee: One moment. We object to that as incompetent, irrelevant and immaterial and not within the issues presented upon the special pleas, and calling for the operation of the witness's mind and not for a fact.

(Question No. 166 repeated by stenographer.)

Mr. Bovee: I am inclined to ask the Examiner to certify that question to the Court.

F. 2394

Mr. Blaikie: I will withdraw the question to save you the trouble.

167 RDQ. You heard Mr. Parsons open for the defense at that time, did you?

A. I did.

168 RDQ. State whether or not he used the following words, "I think that if either of these institutions had at that time suggested that this deed of gift had violated a duty which these donors owed to Mr. Fayer-

weather there would have been a very different outcome of this transaction"—did he use these words?

Mr. Bovee: Objected to as immaterial and irrelevant to the issues presented upon the special pleas and incompetent.

A. Those are the words that I referred to which I I was not able to recall word for word, but I heard those words used by Mr. Parsons on that occasion.

F. 2395

169 RDQ. State whether or not he also on that occasion used the words "But we do know that it was after they had received this sum of money which it was for us to say that they should receive or should not receive."

Mr. Bovee: Same objection. Is that from his opening, Mr. Blaikie?

Mr. Blaikie: Yes, sir, that is from his printed opening handed to us by Mr. MacArthur.

F. 2396

A. He did.

Mr. Blaikie: That is all.

Re-cross examination by Mr. Bovee:

170 RXQ. You were present at that time, Mr. Reynolds?

A. Yes, sir.

171 RXQ. Mr. Blaikie was present?

A. I could not say.

Mr. Blaikie: I did not miss a minute of it, Mr. Bovee.

172 RXQ. Why can't you say?

A. Well, I have no positive knowledge but I think he was there all the time.

173 RXQ. You saw him there, did't you?

F. 2397

A. I saw him there daily, yes, sir.

174 RXQ. Is it not your best recollection that you saw him there at the time that you heard this?

A. Yes, sir, that is my best recollection.

175 RXQ. Colonel James was there, was he not?

A. I am more in doubt about Colonel James. He was busy in Court, if I remember correctly, so that we had to notify him to come in, as he was to take part in that.

176 RXQ. Was that before the case was begun before Judge Truax?

A. Before it had begun?

F. 2398

177 RXQ. Yes.

A. It was when the colleges had rested, if I remember right.

178 RXQ. After the case was actually begun before Judge Truax Colonel James continued to attend the trial of that case until its conclusion, did he not?

A. Well, practically so. I think he had a case in another part.

179 xQ. RXQ. Is it not your best recollection that he was actually present at the time Mr. Parsons made these remarks?

A, Well, I should think more than probably he was.

Mr. Bovee: I think that is all.

Mr. Blaikie: That is all. Will Thursday suit you or Friday?

Mr. Bovee: Friday I have a reference.

Mr. Blaikie: How about Monday?

F. 2399

Mr. Bovee: I have a reference on Monday and Tuesday.

Mr. Blaikie: How about Thursday?

Mr. Bovee: Will you take some testimony on Thursday. I am waiting for you to close.

Mr. Blaikie: I want to see if I can safely close. I do not know at the minute that there is anything more, but I will let you know.

F. 2400

Mr. Bovee: I will tell you frankly that until you do close I do not propose to take any testimony.

Mr. Blaikie: We will make it Thursday next, if agreeable to you, at two o'clock.

Mr. Bovee: Very well.

Adjourned to December 26th, 1901, at 3 P. M.

COMPLAINANTS' PROOFS.

New York, December 26th, 1901.

Adjourned to December 30th, 1901, at 2 p.m.

F. 2401

New York, December 30th, 1901.

Adjourned to January 3rd, 1902, at 2 p.m.

New York, January 3rd, 1902.

Adjourned to January 6th, 1902, at 2 p.m.

F. 2402

New York, January 6th, 1902.

Adjourned to January 9th, 1902, at 2 p.m.

New York, January 9th, 1902.

Adjourned to January 14th, 1902, at 2 p.m.

New York, January 14th, 1902.

Adjourned to January 20th, 1902, at 2 p.m.

New York, January 20th, 1902.

Adjourned to January 22nd, 1902, at 2 p.m.

New York, January 22nd, 1902.

Adjourned to January 27th, 1902, at 2 p.m.

F. 2303

New York, January 27th, 1902.

Adjourned to January 29th, 1902, at 2 p.m.

New York, January 29th, 1902.

Adjourned to January 31st, 1902, at 3 p.m.

F. 2404

New York, January 31st, 1902.

Adjourned to February 5th, 1902, at 3 p.m.

New York, February 5th, 1902.

Adjourned to February 12th, 1902, at 3 p.m.

New York, February 12th, 1902.

Adjourned to February 19th, 1902, at 3 p.m.

TESTIMONY OF JOSHUA M. FIERO.

New York, February 19th, 1902.

Adjourned to February 24th, 1902, at 3 p.m.

New York, February 24th, 1902.

Adjourned to February 28th, 1902, at 3 p.m.

F. 2405

New York, February 28th, 1902.

Met pursuant to adjournment. Present: The Examiner, Mr. Blaikie, Mr. Bovee, Mr. W. R. Brinckherhoff, representing Messrs. Nash & Jones, and Mr. Arthur S. Hamlin, representing Messrs. Root, Howard, Winthrop & Stimson.

F. 2406

JOHN B. REYNOLDS, recalled for further direct examination.

By Mr. Blaikie:

180 Q. You have been questioned by Mr. Parsons as to the extent of your acquaintance with Mr. Fayerweather; please give your information in your own way?

Mr. Bovee: That is objected to first, upon the ground that the time of the complainants in which to take testimony has expired, and has been so stated upon the record; further, it is irrelevant and immaterial to the issues presented upon the special plea.

Mr. Blaikie: Counsel for complainants states that the time has been duly extended by the court.

(Question No. 180 repeated by the stenographer.)

Mr. Bovee: We object to the question as being improper in form.

F. 2407

181 Q. Please state that acquaintance and its extent in your own way?

Mr. Bovee: Same objection.

A. My acquaintance with him was at Saratoga, when he was quite deaf and near-sighted, with his family, having more business calls and social calls than he probably wanted to attend to. While I knew him, if he had been asked a month later if he knew me, I presume he would have said that he did not.

F. 2408

Mr. Bovee: I move to strike out the answer of the witness as not responsive to the question, and as incompetent, irrelevant and immaterial.

Mr. Blaikie: Counsel for complainants files with the Examiner the following stipulation.

The paper was marked Complainants' Exhibit No. 1, February 28th, 1902, C. B.

Complainants' Exhibit No. 1 is as follows: (See Appendix of Exhibit No. 79.)

Mr. Blaikie: Complainants' counsel offers in evidence an exemplified copy of the Charter of the Union Theolog-

ical Seminary, and asks that it be spread upon the record.

The paper was admitted in evidence and marked Complainants' Exhibit No. 2, February 28th, 1902, C. B.

Complainants' Exhibit No. 2 is as follows: (See Appendix of Exhibit No. 80.)

F. 2409

182 Q. Mr. Reynolds, do you know of any other matter or thing relative to the claim of complainants, or of the cross-bill for complainants in this controversy, that you desire to state now; if so, state it?

Mr. Bovee: Counsel for defendants object to the question as improper in form and incompetent; they object to the matter sought to be elicited as irrelevant and immaterial to the issues presented upon the special plea.

A. No.

Cross examination by Mr. Bovee:

F. 2410

183 xQ. In what year was it that you met Mr. Fayerweather in Saratoga, referred to in your testimony today?

A. 1889 or 1890, I think; I cannot recall which.

184 xQ. Have you any memoranda by which you can fix that occasion in one or the other of those years?

A. I could refresh my memory so as to know; yes, sir.

185 xQ. What is your best recollection now as to what year it was in?

A. My best recollection is it was in 1889, and I can fix it positively from this fact, that when Mr. Fayer-

weather and his family went away they were occupying a cottage at the United States Hotel, and a lady friend of mine and theirs, with her husband, were occupying rooms on the Broadway side, and she was very ill; I think within two or three days from their leaving she had an operation, and we moved her into their cottage, that Mr. Fayerweather and his family had occupied, and she died there before recovery, almost to consciousness.

186 xQ. Does that enable you to fix—

F. 2411

A. When I get exactly her death it will fix the date within a month.

187 xQ. Then you are not able to specify definitely, at this time, whether it was 1889 or 1890?

A. Dates are very difficult for me to recall, I would not like to say any closer than that.

188 xQ. What is your best impression, Mr. Reynolds?

A. My impression in 1889.

189 xQ. What month in the year?

A. Probably September.

190 xQ. Why do you say probably September?

F. 2412

A. Because I knew the house was nearly vacant, and Mr. Tompkins had plenty of leisure; he was the proprietor of the hotel, and he, with myself and the doctors, moved this lady into Mr. Fayerweather's room, and she died there within twenty-four hours from the time.

191 xQ. And was it through the incident of this lady friend that you have referred to, that you met Mr. Fayerweather?

A. Well, the family, I should say yes.

192 xQ. You never had met him before?

A. No, sir, or afterwards.

193 xQ Never met him afterwards?

A. No, sir.

194 xQ. Did you ever see him afterwards?

A. Not that I recall.

195 xQ. Was this lady acquainted with Mr. Fayerweather?

A. I should say yes. They were living on Fifth Avenue not far from 57th street, and they were very intimate that summer, and I don't know but for a good many summers before. I wasn't specially interested in the family at the time and only for the circumstances that came up later I should probably not recall the aoquaintance of Mr. Fayerweather, perhaps not with Mrs. Fayerweather or her sister, Miss Joyce, now Mrs. Reynolds.

F. 2413

196 xQ. You say that this sick lady was moved into Mr. Fayerweather's cottage?

A. Yes, sir.

197 xQ. That was one of the cottages associated or connected with the hotel?

A. Yes, sir.

198 xQ. What was the hotel?

A. United States Hotel, Tompkins & Perry, proprietors, at Saratoga, New York.

199 xQ. Then except by arriving at the conclusion by a process of reasoniug, you are not able to say positively that it was in the month of September?

F. 2414

A. I wouldn't like to, now.

200 xQ. How long was Mr. Fayerweather at the hotel on that occasion?

A. That I don't remember. He came down from

the Adirondacks because he was not as well in the Adirondacks.

201 xQ. Mr. Reynolds, I did not ask you for any reasons, I asked you how long Mr. Fayerweather was at the hotel on that occasion?

A. He was not there all summer; I should say—I don't know how many months he was there, Mr. Bovee.

202 xQ. How long were you there?

F. 2415

A. I was there a good part of the summer off and on; I came down to New York quite frequently in the meantime. I was generally there Saturday and Sunday, and sometimes all the week.

203 xQ. You were living at that same hotel?

A. Yes, sir.

204 xQ. Any part of that time were you in Vermont?

A. Yes, sir.

205 xQ. You had a home in Vermont at that time, didn't you?

A. Yes, sir.

F. 2416

206 xQ. Your house was open in Vermont, was it not?

A. I don't know whether it was or not.

207 xQ. You were spending part of your time in Vermont, were you not at that time—in this period?

A. I know I was there with my horses: whether the house was open that summer or not, I don't remember.

208 xQ. Mr. Reynolds, will you swear that Mr. Fayerweather was at that hotel on that occasion that year, for a month?

A. No, sir.

208 xQ. Will you swear that he was there on that occasion at the same hotel continuously for a week, in the month of September?

A. Yes, sir.

210 xP. Two weeks?

A. I don't like to testify to a thing that is almost impossible for me to say, but I should say he was there six weeks.

F. 2417

211 xQ. But you won't swear to it?

A. No, sir.

212 xQ. How many times at that period of time upon this occasion did you see Mr. Daniel B. Fayerweather?

A. Well, it was almost a daily occurrence that we met at the table, or I might say exclusively, so far as he was concerned.

213 xO. And was the table the only place where you met him?

A. I think it was, Mr. Bovee?

214 xQ. Didn't meet him out in the hotel?

F. 2418

A. No, sir, he was not in the habit of wandering around—

215 xQ. I ask you if you met him in the hotel, Mr. Reynolds; I will thank you to answer my question.

A. I think it is answered, is it not?

216 xQ. You think so.

A. If I met him at all I met him in the hotel; I think that would be the only place I would meet him.

217 xQ. How long was this lady in this cottage after she was removed there?

A. She had an operation in her room from
she was removed, and she died within forty-eight
afterwards.

Mr. Bovee: I move to strike out the answer
witness.

218 xQ. I now ask you, Mr. Reynolds, to answ
question.

A. Her body and spirit together, not over
eight hours; probably her spirit remained there
her body was interred, and then they both left.

F. 2419

219 xQ. Are you now able to say whether that
the early part of September?

A. I should be inclined to say nearer the
of September; I think the hotel usually closed
October, and a large number of the guests had
there was but few in the hotel at this time?

220 xQ. Who was with Mr. Fayerweather on
occasion?

A. Mrs. Fayerweather, and then Miss Joyce
Mrs. Reynolds.

F. 2420

221 xQ. And were those two ladies with him a
time that you saw him there?

A. Yes, sir.

222 xQ. Were they the only persons who were
him?

A. I think all that were occupying the cottag
him; very likely he had friends at the table wit
often.

223 xQ. But those were the only members of his family that were in his party?

A. Yes, sir, all I remember.

224 xQ. This table at which you met him was in the dining room of the hotel?

A. Yes, sir.

225 xQ. And were those ladies with him on such occasions when you met him in the dining room?

A. Always.

F. 2421

226 xQ. Did they come from the Adirondacks with Mr. Fayerweather when he came to Saratoga?

A. I did not come down with him, but I so understand.

227 xQ. For how long a time did you continually meet him Mr. Fayerweather at the table of that hotel?

A. I could not answer that question; it might have been two or three weeks and it might have been more or less.

228 xQ. Between the occasion when you met Mr. Fayerweather in Saratoga, that you have testified to, and the time of his death were you at his house in 57th street at all?

F. 2422

A. I never was at his house before his death, or between that occasion of meeting him at Saratoga before his death; in other words, I was never at his house until after his death.

229 xQ. After this occasion which you have testified to which you met him in Saratoga, did you have any communication of any character whatever with Daniel B. Fayerweather?

A. No, sir.

230 xQ. On this occasion did you have any conversation with him?

A. I cannot recall any special conversation; it is doubtful if I had, because it is difficult and unpleasant to talk to a person who is deaf in a public dining-room, and who is evidently very weak and ill; I do not often like to presume upon their patience to talk with them, and therefore I conclude my conversation with him, if at all, was very limited.

F. 2423

231 xQ. Did you understand me to ask you any such question as that, Mr. Reynolds?

A. I understood you to ask what the extent of my acquaintance with Mr. Fayerweather was. Mr. Parsons has pressed me very close in regard to it, and I want to explain it.

Mr. Bovee: I move to strike out the proceeding answer of the witness as not responsive to the question.

232 xQ. What was the name of this lady that you have referred to as being a sick woman?

A. Josephine Ross, the wife of Reuben Ross, of 669 Fifth avenue, and very intimate friends of mine for thirty years or more.

F. 2424

233 xQ. She died, did she, in that cottage?

A. Yes, sir.

234 xQ. Did you go to her funeral?

A. I came down to New York in a private car with them, and made all the arrangements for them, yes, sir.

235 xQ. Were there funeral services in Saratoga?

A. Well, I cannot recall whether there were prayers at the house, my impression is there was, but the funeral was at 669 Fifth Avenue, New York City, and the burial in Greenwood?

236 xQ. Did Mr. Fayerweather attend the religious services in Saratoga?

A. I said he came away and they occupied his rooms; he couldn't very well attend.

F. 2425

237 xQ. Then he was not present at that time?

A. No sir.

238 xQ. Where did he go from there?

A. I suppose he went to New York. That is the way I understand it; I don't know it except by hearsay.

239 xQ. Did he know this lady?

A. Yes, sir.

240 xQ. Did he go to her funeral?

A. I couldn't say that, the house was full. I was there, and Doctor Hall was the minister officiating.

F. 2426

241 xQ. Are you willing to swear, Mr. Reynolds, that on these occasions when you met Mr. Fayerweather at the table in the dining room, that you ever had any conversation with him whatever?

A. Nothing more than what I have said.

242 xQ. Will you swear that you had any conversation with Mr. Fayerweather in the dining room of this hotel. in this period in which you saw him at Saratoga, that you have testified to?

A. I would not undertake to define it any more particularly than I have; it is sufficiently clear for people who want to understand it correctly.

243 xQ. I have not asked you to give any conversation you had with him, I have asked you if you had any conversation whatever with him?

A. I cannot answer that any more definitely than I have.

244 xQ. I ask you if you are willing to swear that on this occasion you had any conversation with Daniel B. Fayerweather whatever?

A. I am unwilling to swear that I did or did not, any more than I have already sworn to.

F. 2427

245 xQ. Then do I understand you to say that you are unwilling to swear from your present recollection that you had any conversation with Mr. Fayerweather on this occasion at all?

A. Mr. Parsons has said—

246 xQ. Answer my question; I am not asking you what Mr. Parsons said.

Mr. Baikie: Answer it your own way.

Mr. Bovee: I object to the witness answering it in his own way; I have a right to ask my questions and receive an answer in my way.

F. 2428

Mr. Baikie: You have no right to instruct him how he shall answer. You answer it in your own way, Mr. Witness

Mr. Bovee: Counsel for defendants protest against the witness spreading upon this record statements which are not responsive to the question and availing himself of this form of examination to make statements not sought and not brought out by counsel for defendants,

as an abuse of the privilege of the witness in giving his testimony in the absence of the Court.

Mr. Blaikie: Answer it in your own way.

A. Mr. Parsons has pressed me as to this acquaintance, and he has stated that Mr. Fayerweather put the restrictions upon Mrs. Reynolds' annuity because he did not wish the marriage to take place between Mr. and Mrs. Reynolds, and he has tried to entangle me in every way to get me to commit myself as to the possibility of such an occurrence taking place, or influencing Mr. Fayerweather, and I want the record to show simply the truth on my part and the falsehood of Mr. Parsons'.

F. 2429

Mr. Bovee: Counsel for defendants move to strike out the answer of the witness as not responsive to the question.

247 xQ. Mr. Reynolds, in this period of time in which you saw Mr. Fayerweather at Saratoga, are you willing to swear that you saw him in conversation with other persons, other than yourself?

Mr. Blaikie: Objected to as immaterial and irrelevant, and not cross-examination.

F. 2430

A. I would not like to say others beyond his family.

248 xQ. Did you see him in conversation with members of his family at the table when you met him?

A. Oh, yes, sir.

249 xQ. And when you say the members of his family, you mean his wife and Mrs. Reynolds?

A. Mrs. Reynolds, then Miss Joyce.

250 xQ. Such conversations being had at the dining table in the public dining-room.

A. Yes, sir.

251 xQ. That was an ordinary occurrence, was it not?

A. Yes; there may have been others at the table frequently, I am inclined to think there were.

252 xQ. What was your custom of meeting him at the table, at the usual meals, breakfast, luncheon and dinner of each day?

F. 2431

A. Well, dinner is an hour when people are more regularly at the table; breakfast and luncheon are not so definite. I should think more on an occasion of a dinner than at any other meal.

Mr. Bovee: I think that is all.

COMPLAINANTS' REST.

Mr. Bovee: The defendants will take ad adjournment for two weeks.

Adjourned to March 17th, 1901, at 3 p. m.

JOHN B. REYNOLDS.

F. 2432

Sworn to before me this 4th day of May, 1902.

JOHN A. SHIELDS,
Examiner.

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CIRCUIT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

FAYERWEATHER *v.* RITCH.	In Equity.
REYNOLDS *v.* RITCH.	

UNITED STATES OF AMERICA,
Southern District of New York, } ss.:

I, JOHN A. SHIELDS, an examiner duly appointed by the Circuit Court of the United States for the Southern District of New York do hereby certify that the foregoing are the proofs for final hearing taken before me in the above-entitled cause on the part of the complainants, under and pursuant to the 67th Rule of the Supreme Court of the United States as amended.

I do further certify that I am not of counsel nor attorney for either of the parties, nor in anywise interested in the event of the said cause.

I do further certify that Mr. Roger M. Sherman and Mr. William Blaikie appeared on the part of the complainants, and Mr. John E. Parsons, Mr. C. M. Bovee, Jr., Mr. James F. Bishop, William B. Putney, Esq., Messrs. Putney and Bishop, Messrs. Russell & Holmes, Messrs. Nash & Jones, Messrs. Root, Howard, Winthrop and Stimson, Messrs. Butler, Notman, Joline and Mynderse, and Messrs. Scott and Upson, appeared on the part of the several defendants in the taking of the said proofs, as indicated in the foregoing depositions contained in Volumes 1 and 2.

JOHN A. SHIELDS,
Examiner.